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No. 93-187

In The
Supreme Court of the United States

October Term, 1993

IN RE HEMINGWAY TRANSPORT, INC., BRISTOL TERMINALS, INC.,

Debtors.

HERBERT C. KAHN, Trustee for HEMINGWAY TRANSPORT, INC. and BRISTOL TERMINALS, INC.,

Petitioner,

vs.

JUNIPER DEVELOPMENT GROUP, a Massachusetts Partnership; and GEORGE D. WHITTEN, AMY WHITTEN and CHARLES WHITTEN, as Trustees of 60 OLYMPIA NOMINEE TRUST,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. *Future Response Costs Under CERCLA.*

1. Does § 502(e)(1)(B) of the Bankruptcy Code mandate disallowance of a contingent claim for reimbursement or contribution of environmental response costs under CERCLA, where the costs have yet to be incurred and both the claimant and the debtor are jointly liable to EPA for the cleanup?

2. Does the "co-liability" element of § 502(e)(1)(B) of the Bankruptcy Code require that both the claimant and the underlying creditor file proofs of claim against a debtor's estate?

3. Is § 502(e)(1)(B) of the Bankruptcy Code designed solely to prevent two creditors from recovering on the same claim; or is the statute also intended to effectuate the orderly and efficient distribution of assets to creditors?

B. *Administrative Expense Priority.*

1. Does § 503(b)(1)(A) of the Bankruptcy Code afford an administrative expense priority with respect to contingent claims for environmental response costs that have not been (and may never be) incurred?

2. Does § 503(b)(1)(A) of the Bankruptcy Code afford an administrative expense priority with respect to the costs incurred by the claimant in removing hazardous waste from property that is no longer owned by the bankruptcy estate?

3. Does § 503(b)(1)(A) of the Bankruptcy Code afford an administrative expense priority with respect to the cost of remediating environmental hazards created pre-petition, in the absence of (a) an imminent and identifiable harm to public safety, or (b) any actionable, post-petition conduct on the part of the Trustee?

PARTIES TO THE PROCEEDING

The parties to the proceeding are those set forth in the caption. Herbert C. Kahn is the chapter 7 bankruptcy trustee of Hemingway Transport, Inc. and its wholly owned subsidiary, Bristol Terminals, Inc. There is no parent company of Hemingway Transport, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Herbert C. Kahn, Trustee of Hemingway Transport, Inc. and Bristol Terminals, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this action on May 4, 1993.

OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit will be reported at 993 F.2d 915 (1st Cir. 1993).

The decision of the United States District Court for the District of Massachusetts is reported at 126 B.R. 656 (D. Mass. 1991).

The decisions of the United States Bankruptcy Court for the District of Massachusetts are reported at 108 B.R. 378 (Bankr. D. Mass. 1989), 105 B.R. 378 (Bankr. D. Mass. 1989) and 73 B.R. 494 (Bankr. D. Mass. 1987).

A copy of each of the reported opinions below is included in the Appendix ("App.").

STATEMENT OF JURISDICTION

The final judgment of the United States Court of Appeals for the First Circuit was entered on May 4, 1993. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 11 U.S.C. §§ 502(e)(1)(B) (Allowance of Claims or Interests), 503(b)(1)(A) (Allowance of Administrative Expenses), and 507(a)(1) (Priorities of Distribution). The pertinent texts of the statutes are set forth in the Appendix.

STATEMENT OF THE CASE[1]

A. Introduction

This petition involves the confusing and often "hazardous" interplay between the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA"). The case arises out of an adversary proceeding commenced in the United States Bankruptcy Court for the District of Massachusetts by Juniper Development Group, *et al.* ("Juniper") against Herbert C. Kahn, trustee ("Trustee") of two Chapter 7 debtors: Hemingway Transport, Inc. ("Hemingway") and Bristol Terminals, Inc. ("Bristol").

Juniper is the current owner and operator of a hazardous waste facility. Hemingway and Bristol (collectively, the "Debtors") owned or operated the facility at the time of disposal of hazardous substances. Both Juniper and the Debtors are jointly and severally liable for "all costs of removal or remedial action" incurred by the United States Environmental Protection Agency ("EPA") in connection with the cleanup of the property. *See* 42 U.S.C. § 9607(a)(4)(A).

In the adversary proceeding, Juniper sought recovery of its "response costs" under § 107(a)(4)(B) of CERCLA. On summary judgment, the Bankruptcy Court held that § 502(e)(1)(B) of the Bankruptcy Code mandated disallowance of Juniper's claim for *future* response costs on the grounds that (1) such claim was one for reimbursement or contribution, (2) Juniper was jointly liable with the Debtor on the claim of EPA, and (3) the claim was contingent upon future events. After trial, the Bankruptcy Court found that the

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1. The facts set forth below are supported by the Joint Appendix submitted to the Court of Appeals (hereafter, "JA").

Debtors were liable to Juniper under CERCLA for *past* response costs in the amount of $38,763.63. In accordance with its previous interlocutory order, the Bankruptcy Court held that Juniper's claim was entitled to an administrative expense priority under 11 U.S.C. §§ 503(b)(1)(A) and 507(a)(1).

The Bankruptcy Court's rulings were affirmed by the United States District Court for the District of Massachusetts. Juniper took an appeal to the United States Court of Appeals for the First Circuit on the applicability of § 502(e)(1)(B) to Juniper's claim for future response costs. The Trustee cross-appealed on the priority of Juniper's claim for past response costs. The First Circuit affirmed the administrative expense ruling, but vacated the order under § 502(e)(1)(B).

B. Substantive Facts.

On July 28, 1982, Hemingway and Bristol simultaneously filed voluntary Chapter 11 bankruptcy petitions. On March 29, 1983, Bristol entered into a written agreement with George Whitten — a general partner of Juniper — regarding the purchase and sale of Bristol's trucking facility located at 60 Olympia Avenue in Woburn, Massachusetts (the "Property"). Pursuant to the contract, Whitten agreed to purchase the Property subject to "all environmental and other applicable laws and ordinances." JA 49. The agreement also included the following language:

> The BUYER acknowledges that the BUYER has not been influenced to enter into this transaction nor has he relied upon any warranties or representations not set forth or incorporated in this agreement. Buyer further warrants and represents to Seller that *Buyer has made all such inspections of the premises as Buyer wishes to make.* . . .

JA 51 (emphasis supplied). On April 29, 1983, an order was entered by the Bankruptcy Court approving the sale of the Property, subject to the terms and conditions set forth in the purchase and sale agreement. JA 194. The order was approved by the District Court on May 3, 1983, and the Property was sold to Juniper, Whitten's nominee, on May 18, 1983. JA 194.

Juniper is a Massachusetts partnership involved in commercial real estate development. JA 64, 93. At the time of the sale, Juniper was familiar with the Woburn area, and had developed several projects within half a mile of the Property. JA 65-66, 68. Juniper also was aware of the existence of a hazardous waste Superfund site located within one mile of the Property. JA 67. Nevertheless, Juniper did not conduct a physical inspection of the entire premises before the sale. JA 69, 224, 227-28. Juniper's inspection was limited to the paved portion of the Property, which consisted of only 6.6 of the 21.4 total acres. *Id.*

On November 18, 1983, the Chapter 11 cases of Hemingway and Bristol were converted to liquidation proceedings under Chapter 7 of the Bankruptcy Code. Herbert C. Kahn was appointed trustee of the Debtors one day later.

On December 30, 1985, Juniper received a "notice of potential liability" under CERCLA from EPA. The notice advised Juniper that EPA had discovered "approximately 12 drums in disintegrated condition" at the southern end of the Property. Tests conducted by EPA in September of 1985 revealed that the drums and surrounding soil were contaminated by a variety of chemicals defined under CERCLA as "hazardous substances." An administrative order directing Juniper to remove the drums was issued on February 7, 1986. JA 71-89.

The drums were located approximately 100 feet from the

railroad tracks on the western border of the Property,[2] JA 347, which was precisely the area that Juniper failed to inspect prior to purchasing the Property.

On April 20, 1988, Juniper received another notice of potential liability from EPA with respect to the Wells G & H Superfund Site. JA 120-25. Wells G & H were municipal wells developed in the 1960's to supplement the water supply for the City of Woburn. JA 151. In 1979, Woburn police discovered over 180 55-gallon drums of industrial waste abandoned in the vicinity of the wells. JA 151. The resulting investigations led to the wells and surrounding area being added to the Superfund National Priorities List in 1982. *See* 48 Fed. Reg. 40,658. The cleanup plan proposed by EPA in 1989 estimated the cost of remediating the Site at $40.3 million. JA 156-61. The 21.4 acre parcel currently owned by Juniper, and formerly owned by the Debtors, is deemed by EPA to be part of the 330-acre Wells G & H Site. JA 120.

By separate letters dated February 3, 1989, Hemingway and Bristol also were notified of their potential liability to EPA with respect to the Wells G & H Site. JA 126-35. The notice letters stated that, unless an agreement could be reached, EPA would perform the cleanup and seek to recover its response costs from Juniper, Bristol, Hemingway and several other responsible parties. JA 126 & 130.

C. Procedural History.

Juniper commenced the adversary proceeding against the

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2. The source of the drums and the circumstances regarding their pre-petition disposal have never been determined. As stated by the Bankruptcy Court after trial, "no allegation has ever been made that Hemingway was responsible for generating the toxic wastes in the barrels or for depositing them on the [Property]." *Hemingway*, 108 B.R. at 380.

Trustee on May 7, 1986. The original adversary complaint alleged that Juniper had incurred expenses in excess of $30,000 in connection with the administrative order, and that Juniper was awaiting "further orders [from EPA] for a possible future clean up" of the Property. JA 4. Juniper asserted claims under § 107(a)(4)(B) of CERCLA for "contribution" (Count I) and "indemnity" (Count II) for "all past or future costs incurred or assessed for said cleanup, plus interest, costs and attorney fees."

On September 13, 1989, the Bankruptcy Court disallowed Juniper's claim for *future* response costs under § 502(e)(1)(B) of the Bankruptcy Code on the grounds that (1) Juniper's claim was one for reimbursement or contribution, (2) Juniper was jointly liable with the Debtor on the claim of EPA, and (3) Juniper's claim was contingent upon future events. *In re Hemingway Transport, Inc.*, 105 B.R. 171 (Bankr. D. Mass. 1989).

On October 17, 1989, the Bankruptcy Court conducted a trial on Juniper's claim for *past* response costs in connection with the administrative order. Judgment was entered in favor of Juniper in the amount of $38,763.63. *In re Hemingway Transport, Inc.*, 108 B.R. 378 (Bankr. D. Mass. 1989). In accordance with its prior interlocutory order, 73 B.R. 494 (Bankr. D. Mass. 1987), the Court held that Juniper's claim for past response costs was an administrative expense.

On March 26, 1991, the District Court affirmed the relevant orders of the Bankruptcy Court. *In re Hemingway Transport, Inc.*, 126 B.R. 656 (D. Mass. 1991). Juniper took an appeal to the United States Court of Appeals for the First Circuit on the applicability of § 502(e)(1)(B) to its claim for future response costs. The Trustee cross-appealed on the priority of Juniper's claim for past response costs. By memorandum and order dated May 4, 1993, the First Circuit affirmed the administrative expense ruling, but vacated the order disallowing Juniper's claim for future response costs under § 502(e)(1)(B).

REASONS FOR GRANTING THE WRIT

I.

THE FIRST CIRCUIT DECISION IN *HEMINGWAY* INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW ABOUT THE PROPER BALANCE BETWEEN THE COMPETING OBJECTIVES OF CERCLA AND THE BANKRUPTCY CODE.

The First Circuit decision in *Hemingway* presents important questions of federal law regarding (1) the circumstances under which environmental claims should be afforded administrative expense priority, and (2) the scope of a debtor's ability under § 502(e)(1)(B) of the Bankruptcy Code to avoid liability with respect to environmental claims. In light of CERCLA's notorious lack of clarity,[3] together with the competing objectives of CERCLA and the Bankruptcy Code,[4] even the most experienced

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3. It is universally recognized that "CERCLA is not a paradigm of clarity or precision." *Pease & Curen Refining, Inc. v. Spectrolab, Inc.*, 744 F.2d 945, 950 (C.D. Cal. 1990) (citations omitted); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 46 (1989) (White, J. dissenting) ("experienced jurists could disagree about Congress' intent under CERCLA"); *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533 (10th Cir. 1992) (noting "convoluted path" of CERCLA's definitions); *Riverside Market Dev. Corp. v. International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 636 (1991) (CERCLA was "hastily drafted" and passed through a "lame-duck" session of Congress); *United States v. Fleet Factors*, 901 F.2d 1550, 1554 n. 3 (10th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991) (CERCLA marred by "careless drafting"); *Artesian Water Co. v. Government of New Castle County*, 851 F.2d 643, 648 (3rd Cir. 1988) (CERCLA criticized for "inartful drafting and numerous ambiguities").

4. It is equally acknowledged that the legislative goals of CERCLA often conflict with the policies embodied in the Bankruptcy Code. *See, e.g., In re Chicago, Mil., St. P. & Pac. R.R.*, 974 F.2d 775, 779 (7th Cir. 1992); *In re Chateaugay Corp.*, 944 F.2d 997, 1002 (2d Cir. 1991); *In re Combustion Equip. Assocs., Inc.*, 838 F.2d 35, 36 (2d Cir. 1988).

environmental and bankruptcy attorneys need guidance on these issues.

The purpose of CERCLA is to abate and prevent pollution by imposing strict liability on a broad range of responsible parties, and to channel as many resources as possible toward the cleanup of hazardous waste. *Stanton Road Associates v. Lohrey Enterprises,* 984 F.2d 1015, 1020 (9th Cir. 1993). In contrast, the Bankruptcy Code is designed to effectuate the fair and efficient distribution of assets to *all* creditors having claims against a debtor's estate. *Reading Co. v. Brown,* 391 U.S. 471, 477 (1968).

The issue of whether environmental claims should be afforded an administrative expense priority presents a classic example of the conflict between the competing aims of CERCLA and the Bankruptcy Code.[5] On the one hand, the priority treatment of environmental claims would promote the goal of ensuring that sufficient funds are available to clean up contaminated property. On the other hand, affording a priority to environmental claims almost invariably eliminates any distributions to a debtor's remaining creditors.

The applicability of § 502(e)(1)(B) of the Bankruptcy Code to contingent claims under CERCLA presents a similar problem. Section 502(e)(1)(B) mandates disallowance of contingent claims for reimbursement or contribution asserted by an entity that is liable with the debtor on the claim of another creditor. As stated by the Eleventh Circuit Court of Appeals, § 502(e)(1)(B) "epitomizes a considered Congressional policy that underlies the Bankruptcy Code as a whole . . .; that is, the bankrupt's estate should not be

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5. The Supreme Court has declined on two occasions to address the administrative expense issue. *See Midlantic National Bank v. New Jersey Department of Environmental Protection,* 106 S. Ct. 755, 758 n. 2 (1986); *Ohio v. Kovacs,* 469 U.S. 274, 284-85 n. 12 (1985).

burdened by estimated claims contingent in nature." *In re Charter Co.*, 862 F.2d 1500, 1502 (11th Cir. 1989). This important federal policy directly contradicts the equally fundamental goal of requiring all potentially responsible parties to fund the cleanup of hazardous waste facilities.

The decision in *Hemingway* presents several issues of first impression. Resolution of these issues will help to bridge the gap between the discordant policies of the Bankruptcy Code and CERCLA, and will have a profound effect on the practice of environmental law and the administration of bankruptcy estates. The need for further guidance in each of these areas is evidenced by the increasing number of bankruptcy filings that are motivated, in whole or in part, by the existence of environmental claims.

II.

THE FIRST CIRCUIT DECISION IN *HEMINGWAY* IS IN CONFLICT WITH THE REPORTED DECISIONS OF OTHER COURTS OF APPEALS.

A. Future Response Costs Under § 502(e)(1)(B).

The Supreme Court has never addressed the applicability of § 502(e)(1)(B) of the Bankruptcy Code, which provides as follows:

> (e)(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the Debtor on or has secured the claim of a creditor, to the extent that —
>
> * * *

> (B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; . . .

11 U.S.C. § 502(e)(1)(B). As indicated by the above language, three elements must be established in order for the statute to apply to particular claim: (1) the claim must be one for "reimbursement or contribution;" (2) the entity asserting the claim for reimbursement or contribution must be "liable with the debtor" on the claim; and (3) the claim must be "contingent" at the time of its allowance or disallowance. *In the Matter of Provincetown-Boston Airlines, Inc.*, 72 B.R. 307, 309 (Bankr. M.D. Fla. 1987) (hereafter, "*PBA*").

The first case to consider the applicability of section 502(e)(1)(B) to a private party claim under CERCLA was *In re The Charter Company*, 81 B.R. 644 (M.D. Fla. 1987), *aff'd*, 862 F.2d 1500 (11th Cir. 1989). In *Charter*, the debtor and the claimants were jointly and severally liable for all future costs incurred by EPA in responding to the disposal of dioxin-bearing waste. Applying the three part test set forth in *PBA*, the bankruptcy court, the district court and the Eleventh Circuit Court of Appeals each held that the creditors' contingent claims under CERCLA fell squarely "within the ambit of § 502(e)(1)(B)."[6] *See Charter*, 862 F.2d at 1502.

The Ninth Circuit also has addressed the impact of section 502(e)(1)(B) on contingent claims for reimbursement or contribution under CERCLA. *See In re Dant & Russell, Inc.*, 951

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6. Likewise, the Bankruptcy Court and the District Court in *Hemingway* "had no difficulty" concluding that section 502(e)(1)(B) mandated disallowance of Juniper's contingent claim for future response costs. *See, e.g., Hemingway*, 105 B.R. at 177.

F.2d 246 (9th Cir. 1991). In *Dant & Russell*, the claimant filed a proof of claim in excess of $14,000,000, seeking approximately $1,000,000 for "actually incurred" cleanup costs and the remainder for future cleanup. With respect to future costs, the Court of Appeals found that the proposed cleanup would be performed voluntarily, rather than at the behest of EPA. *Dant & Russell*, 951 F.2d at 248-49. Thus, § 502(e)(1)(B) did not apply because there was no "third party" such as EPA to whom the claimant was "liable with" the debtor. *Dant & Russell*, 951 F.2d at 249; *see id.* at 249-50 (disallowing contingent claim for future costs on other grounds).

In *Hemingway*, the First Circuit Court of Appeals repeatedly stated that section 502(e)(1)(B) was enacted only for the purpose of ensuring that bankruptcy estates are not exposed to "double-dipping" by holders of the same underlying claim. App. 12a-13a, 18a. Given that EPA had not filed a proof of claim against the Debtors' estate, the Court of Appeals expressed concern that the disallowance of Juniper's claim under § 502(e)(1)(B) "may occasion a pointless financial loss to Juniper and result in a windfall to the chapter 7 estate." App. 23a-24a. For this reason, the court in *Hemingway* fashioned a new and entirely unique procedure for determining contingent claims under § 502(e)(1)(B) in cases where one creditor has not filed a timely proof of claim; namely, "mandatory resort" to the surrogate claim provisions of 11 U.S.C. §§ 501(b) and (c).

Sections 501(b) and (c) of the Bankruptcy Code provide that, "[i]f a creditor does not timely file a proof of such creditor's claim," a surrogate claim may be filed by either the debtor or "an entity that is liable to such creditor with the debtor." 11 U.S.C. §§ 501(b) and (c). The Court of Appeals in *Hemingway* acknowledged that § 501 is permissible, and that the statutory deadline for filing surrogate claims expired in 1984. App. 21a, 22a n. 14. Nevertheless, the court held that Juniper's claim could not be

disallowed under § 502(e)(1)(B) unless and until the Trustee elected to file a surrogate proof of claim on behalf of EPA.

The *Hemingway* opinion is in direct conflict with the decisions in *Charter* and *Dant & Russell.* Neither the Eleventh nor the Ninth Circuit Courts of Appeals would require "mandatory resort" to the surrogate claim procedures of § 501. Further, the *Hemingway* opinion forces a trustee to establish the liability of the claimant and the underlying creditor before obtaining the benefit of § 502(e)(1)(B). A trustee is not permitted to rely upon the proofs of claim. *Cf. Charter,* 862 F.2d at 1503 (claimants bound by admissions in proofs of claim); JA 1-6 (Juniper admitted its joint liaiblity in the adversary complaint and characterized its contingent claim as one for reimbursement or contribution).

The conflict between *Hemingway* and *Charter* stems from a fundamental difference in policy. The First Circuit's view is that the "singular purpose" of § 502(e)(1)(B) is to prevent redundant recoveries on identical claims. In contrast, the Eleventh Circuit's opinion is that the statute "epitomizes a considered Congressional policy" of providing "fair treatment to creditors by paying ascertainable claims as quickly as possible." *Charter*, 862 F.2d at 1502.[7] Similarly, the Court of Appeals in *Hemingway* believes that strict adherence to the Bankruptcy Code may thwart CERCLA's goal of obtaining broad financial participation in the cleanup of hazardous wastes. Conversely, the Eleventh Circuit Court of Appeals concludes that upholding the Code's prohibition of contingent claims encourages the expeditious cleanup of contaminated sites, "since those seeking contribution will have to incur [response costs] prior to stating an allowable claim to a

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7. *See also In re Wedtech Corp.*, 85 B.R. 285, 290 (Bankr. S.D.N.Y. 1988) ("purpose of disallowing contingent indemnity and contribution claims is precisely because they are so contingent"); *In re A & H, Inc.*, 122 B.R. 84, 85 (Bankr. W.D. Wis. 1990) (statue reflects dual policy of preventing double payment and promptly satisfying ascertainable claims).

bankrupt's estate." *Charter*, 862 F.2d at 1503-04.

The decisions in *Charter* and *Hemingway* are diametrically opposed. Given that the allowance or disallowance of environmental claims in bankruptcy is a question of great national significance, the applicability of § 502(e)(1)(B) to claims for future response costs under CERCLA should not be resolved in a piecemeal fashion by the remaining Circuit Courts of Appeals. The Trustee respectfully submits that the Supreme Court should grant his petition for certiorari in order to avoid any further confusion.

B. Administrative Expense Priority.

Under the Bankruptcy Code, administrative expenses are entitled to a first priority of distribution. 11 U.S.C. § 507(a)(1). The Code defines administrative expenses in relevant part as the "actual, necessary costs and expenses of preserving the estate . . . ." 11 U.S.C. § 503(b)(1)(A). There is a large body of diverse and conflicting case law regarding the circumstances under which environmental claims should be afforded administrative expense priority.

1. The First Circuit Granted An Administrative Priority To Juniper's Claim For Contingent, Not "Actual," Response Costs Under CERCLA.

A "contingent" administrative expense does not exist under the Bankruptcy Code. *See* 11 U.S.C. § 503(b)(1)(A) (only "actual" costs are afforded priority treatment). Nevertheless, the Court of Appeals in *Hemingway* held that Juniper's *future* response costs — which have not been (and may never be) "actually" incurred — could give rise to an administrative expense claim.[8] The

8. The First Circuit in *Hemingway* held that Juniper's contingent claim, once estimated and allowed, would be transformed into an "actual" expense of administration. App. 29a.

unprecedented opinion in *Hemingway* conflicts with virtually every other decision rendered by a United States Court of Appeals. *See, e.g., In re Dant & Russell, Inc.*, 853 F.2d 700, 706-07 (9th Cir. 1988) ("actual" benefit must accrue); *NL Industries, Inc. v. GHR Energy Corp.*, 940 F.2d 957, 966 (5th Cir. 1991) (only "actual," not punitive, damages constitute administrative expenses); *In re Carpet Center Leasing Co., Inc.*, 991 F.2d 682, 688 (11th Cir. 1993) (priority granted only with respect to value of trustee's "actual," not potential, use of collateral post-petition).

2. *The First Circuit Granted An Administrative Priority To Juniper's Claim For Decontaminating Property That Did Not Belong To The Estate.*

As noted above, an administrative expense must be part of the "necessary costs and expenses of *preserving the estate*." 11 U.S.C. § 503(b)(1)(A) (emphasis supplied). In contrast, the Court of Appeals in *Hemingway* afforded priority treatment to Juniper's claim for the past and future costs of preserving *non-estate property*. The cleanup brought Juniper (*not* the Debtors) into compliance with environmental laws. *Cf., In re Wall Tube & Metal Products Co.*, 831 F.2d 118, 122-23 (6th Cir. 1987) (property owner must comply with environmental laws).

In *Wall Tube*, the trial court expressly held that once property is no longer part of the estate, "any expenses thereafter incurred in connection with the [cleanup] cannot qualify as administrative costs of preserving the estate." *Wall Tube*, 56 B.R. 918, 923 (Bankr. E.D. Tenn. 1986), *rev'd on other grounds*, 831 F.2d 118 (6th Cir. 1987). On appeal, the Sixth Circuit specifically noted that the response costs at issue were incurred only "in connection with the items that remain in the debtor's estate." *Wall Tube*, 831 F.2d at 120 n. 7.[9]

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9. *See In re Chateaugay Corp.*, 112 B.R. 513, 525 n.22 (S.D.N.Y. 1990), (Cont'd)

Both the Third Circuit and the Ninth Circuit have expressly refused to grant an administrative expense priority to claims arising from the cleanup of non-estate property. *See Southern Railway Co. v. Johnson Bronze Co.*, 758 F.2d 137 (3rd Cir. 1985); *In re Dant & Russell, Inc.*, 853 F.2d 700, 707-09 (9th Cir. 1988). Moreover, the "property of the estate requirement" is implicit in all cases holding that environmental response costs "preserve the estate." The *Hemingway* opinion directly conflicts with these decisions.

3. The First Circuit's Decision Conflicts With The "Midlantic National Bank" Line of Cases.

In *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755, 762 (1986), the Supreme Court held that a bankruptcy court "does not have the power to authorize abandonment [of estate property] without formulating conditions that will adequately protect the public's health and safety." The Court noted, however, that the exception to the abandonment power "is a narrow one," which "does not encompass speculative or indeterminate" dangers. *Midlantic*, 106 S. Ct. at 762-63 n. 9. In order to prevent abandonment, the moving party must show that an "imminent and identifiable harm" to public safety would result. *Id.*

(Cont'd)

aff'd, 944 F.2d 977 (2d Cir. 1991) (noting that EPA did not seek priority for "costs relating to property not owned by debtor"); *In re Brio Refining, Inc.*, 86 B.R. 487, 488-89 (N.D. Tex. 1988) (no priority where property was not part of the estate at the time response costs were incurred); *In re Stevens*, 68 B.R. 774, 76 (Bankr. D. Me. 1987) ("trustee confirmed that [storage area] and drums were the property of the bankrupt estate" at the time of cleanup); *In re T.P. Long Chemical, Inc.*, 45 B.R. 278, 281 (Bankr. N.D. Ohio 1985) (noting EPA's own admission that costs incurred to cleanup non-estate property were not allowable as an administrative expense).

Although the Court expressly reserved the issue of administrative expenses, 106 S. Ct. at 758 n. 2, a growing number of cases have relied upon *Midlantic* in granting priority status to post-petition response costs.[10] The reasoning of these decisions is that, where property of the estate cannot be abandoned under *Midlantic,* the trustee has an implicit duty to expend the debtor's funds to bring the property into compliance with environmental laws. If the trustee is unwilling to perform the cleanup, the costs incurred in substitute fulfillment of the trustee's obligations are deemed to confer a benefit on the estate.

The decision in *Hemingway* is in conflict with the *Midlantic*-based cases in at least two critical respects. First, the property at issue was not "property of the estate" at the time Juniper incurred its response costs. *See supra.* Second, Juniper's response costs were not incurred in abating an "imminent and identifiable harm" to the public health and safety. Juniper was awarded less than $39,000 for removing 17 drums, which contained a "semi-solid, tar-like substance." The testimony at trial revealed that the "petroleum constituents" contained in the drums presented only a "minor threat" to the environment. *Compare Wall Tube*, 831 F.2d at 124 ("It is undisputed that the hazardous wastes still within the debtor's estate after the 1984 conveyance presented a danger to the public's health and safety").

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10. *See, e.g., Chateaugay,* 944 F.2d at 1002; *In re Smith-Douglas, Inc.*, 856 F.2d 12 (4th Cir. 1988); *In re Wall Tube & Metal Products, Co.*, 831 F.2d 12 (4th Cir. 1987); *see also, In re Chicago, Rock Island and Pacific Railroad Co.*, 756 F.2d 517 (7th Cir. 1985) (pre-*Midlantic* case anticipating and effectively following the Supreme Court's holding).

III.

THE *HEMINGWAY* OPINION IS IN CONFLICT WITH THE SUPREME COURT'S DECISION IN *READING CO. V. BROWN* AND THE REPORTED DECISIONS OF OTHER COURTS OF APPEALS.

In *Reading Co. v. Brown*, 391 U.S. 471 (1968), a receiver was appointed to operate a realty company under Chapter XI of the Bankruptcy Act. The trial court found that a fire caused by the receiver's negligent operation of the debtor's business destroyed the property of certain creditors. In holding that the creditors' tort claims were entitled to priority status as costs of administration, the Supreme Court emphasized one important and decisive statutory objective: "fairness to all persons having claims against an insolvent." 391 U.S. at 477.

Reading stands for the proposition that the post-petition operation of a debtor's business may, in limited circumstances, give rise to a first priority administrative expense. *See In re E.A. Nord., Co., Inc.*, 78 B.R. 289, 291-92 (E.D. Wash. 1987); *Yorke v. NLRB*, 709 F.2d 1138, 1143 (7th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984). The rationale is that existing creditors are presumed to benefit from the continued operation of the debtor's business, and therefore any persons injured by such operation should recover their claims on a priority basis. *Reading*, 391 U.S. at 478. *Reading* and its progeny rest firmly on the existence of a post-petition act or omission on the part of the person managing the debtor's affairs.[11]

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11. The post-petition character of the actionable wrong is common to all cases decided under the *Reading* rationale. *See, e.g., U.S. Dept. of Interior v. Elliot*, 761 F.2d 168 (4th Cir. 1985) (post-petition violation of Surface Mining Control and Reclamation Act); *Yorke v. NLRB*, 709 F.2d 1138, 1143 (7th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984) (estate must bear responsibility for trustee's intentional, post-petition unfair labor practice); *Carter-Wallace, Inc. v. Davis-Edwards Pharmacal Corp.*, 443 F.2d 867, 874 (2d Cir. 1971) (trustee intentionally infringed upon plaintiff's patent).

Pre-petition events—even those resulting in strict liability—do not give rise to administrative expense claims.[12]

To the extent that *Hemingway* can be construed as a *Reading*-based opinion,[13] the case is in conflict with the Supreme Court and other courts of appeals because Juniper was not injured by the operation of the Debtors' businesses. The only "post-petition" event was the sale of the property, which Juniper voluntarily purchased (1) subject to "all environmental laws," (2) without any warranties or representations on the part of the estate, and (3) after conducting "all such inspections of the premises as [Juniper] wishe[d] to make." JA 49-52; *see Marden Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1460 (9th Cir. 1986) ("nothing in CERCLA suggests that it was intended to offer special protection to unwary purchasers").

There is no basis for concluding that it would be "more natural and just" to permit Juniper to recover ahead of the Debtors' remaining creditors. *See Reading*, 391 U.S. at 482. Juniper voluntarily and knowingly contracted with a bankrupt company

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12. *See Southern Railway Co. v. Johnson Bronze Co.*, 758 F.2d 137 (3rd Cir. 1985); *In re Dant & Russell, Inc.*, 853 F.2d 700 (9th Cir. 1988); *see also, In re Pettibone Corp.*, 90 B.R. 918, 934 (Bankr. N.D. Ill. 1988) (products liability claim based upon pre-petition acts); *In re Security Gas & Oil, Inc.*, 70 B.R. 786, 795 n. 5 (Bankr. N.D. Cal. 1987) (environmental hazard created pre-petition gives rise to general unsecured claim); *In re Pierce Coal & Constr., Inc.*, 65 B.R. 521, 530 (Bankr. N.D. W. Va. 1986) (only environmental damages caused by the post-petition operation of the bankruptcy estate are entitled to priority).

13. In *Hemingway*, the First Circuit sends conflicting signals regarding its reliance upon the *Reading* line of cases. On the one hand, the court noted that "Juniper dealt *voluntarily* on a contractual basis with the chapter 11 estate," and that the "fairness" doctrine in *Reading* was misapplied by the lower courts. On the other hand, the court cited *Reading* in affording priority treatment to Juniper's claim for past and future response costs.

for the purchase and sale of commercial real estate; the remaining creditors unwittingly provided goods and services to an entity that later became insolvent. Juniper had the ability to avoid its losses by conducting a simple inspection of the Property; the remaining creditors found themselves "in a dilemma not of their own making." *See Reading*, 391 U.S. at 483. Therefore, a proper balancing of the equities would not warrant a disturbance of the priorities established by Congress. *See J. Catton Farms v. First Nat. Bank of Chicago*, 779 F.2d 1242, 1249 (7th Cir. 1985) (*Reading* "stressed the involuntary nature of the tort victim's relationship to the bankrupt . . . , a consideration emphatically not present in this case").

IV.

THE *HEMINGWAY* OPINION CALLS FOR THE SUPREME COURT TO EXERCISE ITS SUPERVISORY POWERS OVER THE FEDERAL COURTS.

The *Hemingway* opinion is fundamentally flawed because it is based upon facts that were not in evidence. The keystone of *Hemingway* is the surrogate claim procedure under § 501 of the Bankruptcy Code. Pursuant to Bankruptcy Rules 3004 and 3005(a), a surrogate claim must be filed within 30 days of the bar date for filing proofs of claim. Although the bar date in Hemingway expired in 1984, the First Circuit held that the Trustee and Juniper, as EPA surrogates, could avail themselves of the "extended filing" provisions of § 726(a)(2)(C)(i) of the Code. This section authorizes distributions with respect to claims that were tardily filed *only if* the claimant "did not have notice or actual knowledge of the case in time for timely filing. . . ." 11 U.S.C. § 726(a)(2)(C)(i). *Without any factual support on the record* regarding "notice or actual knowledge," the First Circuit found that—almost 10 years after the bar date—"EPA can yet file a belated claim that can receive payment along with other timely-filed unsecured claims. . . ."

In addition to making factual determinations *sua sponte*, the First Circuit in *Hemingway* decided at least one legal issue that was never presented, briefed or argued on appeal: namely, the circumstances under which Juniper's claim for *future* response costs may be entitled to administrative expense priority. In 1989, the Bankruptcy Court entered summary judgment disallowing Juniper's claim for future response costs under § 502(e)(1)(B). Accordingly, the Bankruptcy Court refused to admit any evidence at trial with respect to such claim. The scope of the trial was limited to the *actual costs* incurred by Juniper in removing 17 barrels of hazardous waste from the Debtors' former trucking facility. The priority of any future costs related to the entire Wells G & H Site was never presented to the Bankruptcy Court. Four years after the trial, the First Circuit decided this issue *sua sponte*.

The exercise of judicial power under Article III of the Constitution depends upon the existence of an "actual controversy," which "must be extant at all stages of review." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). In contrast, the Court of Appeals in *Hemingway* improperly assumed facts not in evidence and, without any notice to the parties, chose to establish its position on the priority of future response costs under CERCLA. The court's opinion "so far depart[s] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." *See* Supreme Court Rule 10.1.(a); *see also, Helling v. McKinney*, 61 U.S.L.W. 4648 (U.S. June 18, 1993) (Court of Appeals improperly decided issues and facts *sua sponte*).

CONCLUSION

For the reasons stated and on the authorities cited, the Trustee's petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED MAY 4, 1993

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 92-1040

IN RE HEMINGWAY TRANSPORT, INC., ET AL.,
Debtors,

JUNIPER DEVELOPMENT GROUP, ETC., ET AL.,
Appellants,

v.

HERBERT C. KAHN, ETC.,
Appellee.

No. 92-1095

IN RE HEMINGWAY TRANSPORT, INC., ET AL.,
Debtors,

JUNIPER DEVELOPMENT GROUP, ETC., ET AL.,

v.

HERBERT C. KAHN, ETC.,
Appellant.

Appendix A

No. 92-1289

IN RE HEMINGWAY TRANSPORT, INC., ET AL.
Debtors,

JUNIPER DEVELOPMENT GROUP, ETC., ET AL.,
Appellants,

v.

HERBERT C. KAHN, ETC.,
Appellee.

No. 92-1290

IN RE HEMINGWAY TRANSPORT, INC., ET AL.,
Debtors,

JUNIPER DEVELOPMENT GROUP, ETC., ET AL.,
Appellees,

v.

HERBERT C. KAHN, ETC.,
Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Rya W. Zobel, *U.S. District Judge*]

Before
Torruella, Cyr and Boudin,
Circuit Judges.

Appendix A

Roy P. Giarrusso with whom *Louis N. Massery* and *Cooley, Manion, Moore & Jones, P.C.* were on brief for appellants.

William F. Macauley with whom *Martin P. Desmery* and *Craig and Macauley* were on brief for appellee.

Martin P. Desmery for trustee appellee in cross-appeal.

May 4, 1993

CYR, *Circuit Judge*. The bankruptcy court disallowed the contingent claim Juniper Development Group ("Juniper") filed against the consolidated chapter 7 estate of Hemingway Transport, Inc. ("Hemingway") and Bristol Terminals, Inc. ("Bristol") for anticipated response costs for the removal and remediation of hazardous substances discovered on property previously purchased by Juniper from the Hemingway-Bristol chapter 11 estate. Juniper's companion claim for cleanup-related attorney fees was disallowed as well. The district court affirmed and Juniper appeals. The chapter 7 trustee ("trustee") cross-appeals the allowance of Juniper's priority claim for past cleanup costs as an administrative expense.

I

BACKGROUND

Between 1963 and 1982, Hemingway and Bristol continuously owned or operated a trucking business conducted from a twenty-acre parcel of land located in Woburn, Massachusetts ("facility").[1] In May 1980, the Massachusetts

1. Hemingway began business operations at the facility shortly after acquiring it in 1963. In 1974, Hemingway sold the facility to Woburn Associates, but continued to occupy it under a leaseback arrangement with Woburn. In 1980, Bristol, a wholly owned Hemingway subsidiary, acquired the facility from Woburn.

Appendix A

Department of Environmental Quality Engineering (DEQE) discovered seventeen corroded drums leaching a semi-solid, tar-like substance onto a 13.8 acre "wetlands" area at the facility. DEQE informed Hemingway that the substance contained petroleum constituents DEQE received assurances from Hemingway that the drums would be removed. The drums were still at the facility when DEQE conducted its last site inspection, in August 1982.

In July 1982, Hemingway and Bristol filed chapter ll petitions. With the approval of the bankruptcy court, appellant Juniper, a local land developer, purchased the facility from debtor-in-possession Bristol for $1.6 million on April 29, 1983. Prior to the purchase, Juniper's representatives conducted an on-site inspection but did not walk the wetlands area where DEQE had discovered the drums; Juniper contends that the area was submerged at the time. Seven months after the sale, the Hemingway-Bristol chapter 11 reorganization proceeding was converted to a chapter 7 liquidation proceeding, and a chapter 7 trustee was appointed.

In April 1985, drums containing various solvents and pesticides classified as "hazardous substances" under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9657, 9601(14) (1981), were discovered at the facility, in the *same wetlands area,* by the United States Environmental Protection Agency ("EPA"). The following December, Juniper, then the "owner" of the facility, received notice that the EPA considered Juniper a "potentially responsible party" ("PRP") under CERCLA, *see id.* § 9607(a). Shortly thereafter the EPA issued an administrative order requiring Juniper to remove the hazardous substances from the facility at its own expense. *See id.* § 9606. Juniper claims $92,088 in response

costs incurred pursuant to the EPA administrative order.[2]

Juniper initiated an adversary proceeding against the Hemingway-Bristol estate for CERCLA response costs already incurred under the EPA administrative order and for future response costs required to complete the anticipated cleanup and remediation. Initially, the bankruptcy court denied the trustee's motion for summary judgment on Juniper's CERCLA claim. The court determined that Juniper's CERCLA claim, if ultimately allowed, would be entitled to priority payment from the chapter 7 estate as an administrative expense of the chapter 11 estate, since Juniper's exposure to CERCLA liability had arisen from its postpetition agreement to purchase the facility from the chapter 11 estate. *In re Hemingway Transp., Inc.*, 73 B.R. 494, 505 (Bankr. D. Mass. 1987) (citing *Reading Co. v. Brown*, 391 U.S. 471 (1968)).[3]

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2. Juniper alleges that an engineering firm was paid $30,208 to remove the drums; an environmental consulting firm was paid $7,880 to monitor the removal action; and a law firm was paid $54,000 to ensure adequate compliance with the EPA order.

In April 1988, EPA demanded $2.1 million in CERCLA contribution from Juniper for costs incurred by EPA in assessing and evaluating the site. The PRP notice advised that Juniper would be notified of future "cleanup response costs" as well. In February 1989, EPA sent PRP notices to Hemingway and Bristol, as former owner-operators of the facility. *See infra* note 9.

3. Although count I of the original Juniper complaint did not assert a right to CERCLA contribution, when the trustee's motion for summary judgment on count I was denied the bankruptcy court allowed Juniper to amend count I to assert a claim for contribution under 42 U.S.C. § 9607(a). *In re Hemingway Transp.*, 73 B.R. at 507-08. *See also infra* note 20. The court entered summary judgment for the trustee on count II, which alleged a breach of warranty by Bristol, and on Count III, which sought rescission of the land-sale agreement on the ground of fraudulent misrepresentation.

(Cont'd)

The trustee renewed the motion for summary judgment on Juniper's claim for *future* response costs, and moved for reconsideration of the "administrative expense priority" ruling previously entered by the bankruptcy court. The bankruptcy court then disallowed Juniper's claim for *future* response costs, pursuant to Bankruptcy Code § 502(e)(1)(B), 11 U.S.C. § 502(e)(1)(B), on the ground that Juniper was the holder of a contingent CERCLA contribution claim based on a debt owed EPA for which Juniper, Hemingway, and Bristol were jointly and severally liable, in connection with which Juniper had yet to incur any liability by the time of the allowance of its claim. *In re Hemingway Transp., Inc.*, 105 B.R. 171, 176-78 (Bankr. D. Mass. 1989). The bankruptcy court reaffirmed its earlier ruling entitling Juniper to administrative expense priority on its claim for *past* response costs.

Following trial on Juniper's $92,088 claim for CERCLA response costs previously incurred, the bankruptcy court ruled that Hemingway and Bristol were responsible parties "liable" to the EPA, as they either owned or operated the facility at the time a passive "disposal", of hazardous substances occurred at the facility. *In re Hemingway Transp., Inc.*, 108 B.R. 378, 380 (Bankr. D. Mass. 1989) (holding that CERCLA liability arising from

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(Cont'd)

As to count II, the bankruptcy court held that Juniper had forfeited any right to recover for breach of warranty by representing in the contract that it had "made all such inspections of the premises as [it] wishe[d] to make." *Id.* at 506. As to count III, the bankruptcy court held that Juniper failed to allege fraud with the requisite particularity. *Id.* (holding that Massachusetts law requires more than proof of the seller's nondisclosure of a known defect; it requires proof that the seller deliberately concealed, or prevented the buyer from discovering, known defects). Juniper does not challenge this bankruptcy court ruling.

"disposal" need not result from affirmative acts, but encompasses "leaking" of previously deposited waste during PRP's ownership) (citing *United States v. Waste Indus., Inc.*, 734 F.2d 159, 164 (4th Cir. 1984)). Significantly, however, the bankruptcy court noted no evidence that Hemingway or Bristol, notwithstanding their continuous ownership or possession of the facility for a period of twenty years, either generated or deposited hazardous wastes at the facility. *Id.* at 380.

The bankruptcy court allowed Juniper's claim for past response costs in the amount of $38,763 as an administrative expense entitled to priority payment, *id.* at 382, but disallowed the $54,000 claim on the ground that attorney fees are not recoverable in a private action under 42 U.S.C. § 9607(a)(4)(B). *Id.* at 383. Juniper appealed the rulings disallowing its claim for future response costs and for attorney fees. The trustee cross-appealed the order allowing Juniper's $38,763 priority claim for administrative expense. The district court affirmed. *In re Hemingway Transp., Inc.*, 126 B.R. 656 (D. Mass 1991).

II

DISCUSSION

A. Juniper's Appeal: Disallowance of Future Response Costs (11 U.S.C. § 502(e)(1)(B).

1. The Intersection of CERCLA and the Bankruptcy Code.

Juniper finds itself stranded at the increasingly crowded "intersection" between the discordant legislative approaches embodied in CERCLA and the Bankruptcy Code. *See In re*

Chateaugay Corp., 944 F.2d 997, 1002 (2d Cir. 1991). CERCLA's settled policy objectives, reemphasized in the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), prominently include the expeditious cleanup of sites contaminated or threatened by hazardous substance releases which jeopardize public health and safety, and the equitable allocation of cleanup costs among all potentially responsible persons ("PRPs"). *See United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 90-91 (1st Cir. 1990); *see also B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992). The PRP class broadly encompasses, *inter alia*, past and current owners or operators of a contaminated facility. *See* 42 U.S.C. § 9607(a). To foster CERCLA's primary objective — promotion of spontaneous private cleanup initiatives — all PRPs are deemed strictly liable for the total response costs required to remediate the contaminated facility. *See United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 26 n.3 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991). Strict liability is normally both joint and several. *See O'Neil v. Picilli*, 883 F.2d 176, 178 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990); *see also New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985).[4] And the EPA is invested with

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4. The defendant in an EPA enforcement action would have an especially heavy burden to establish that the shared responsibility of the PRPs is divisible, so as to elude imposition of joint and several liability. *Cf. O'Neil*, 883 F.2d at 178-79 ("[R]esponsible parties rarely escape joint and several liability [because] it is [often] impossible to determine the amount of environmental harm caused by each party."); *see also United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808-10 (S.D. Ohio 1983). However, in a CERCLA contribution action *among* responsible parties who are jointly and severally liable, the burden of proof is less demanding, though the court nevertheless may undertake a comparable allocation of the relative responsibilities of the joint obligors. *See* 42 U.S.C. § 9613(f)(1) ("[T]he court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."); *see also Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 90 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989). In

(Cont'd)

broad administrative discretion to compel PRPs to undertake immediate cleanup measures, a prerogative largely insulated from judicial review at the pre-enforcement stage. *See* 42 U.S.C. § 9606; *see also* 42 U.S.C. § 9613(f) (PRPs who settle with EPA are immune from subsequent contribution claims); *In re CMC Heartland Partners*, 966 F.2d 1143, 1148 (7th Cir. 1992).

(Cont'd)
approaching these divisibility and apportionment determinations, the courts have relied on various guideposts, including the legislative history in general, and the so-called "Gore Factors" in particular:

> (i) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished;
>
> (ii) the amount of the hazardous waste involved;
>
> (iii) the degree of toxicity of the hazardous waste involved;
>
> (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
>
> (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
>
> (vi) the degree of cooperation by the parties with Federal, State or local officials to prevent any harm to the public health or the environment.

Environmental Transp. Sys., Inc. v. Ensco, Inc., 969 F.2d 503, 508-09 (7th Cir. 1992) ("Gore factors" provide a nonexhaustive but valuable roster of equitable apportionment considerations) (quoting *United States v. A & F Materials Co., Inc.*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984)).

At the same time, however, CERCLA section 9613(f) is aimed at promoting equitable allocations of financial responsibility by authorizing PRPs subjected to pending or completed EPA enforcement actions under 42 U.S.C. §§ 9606 and 9607(a)(4)(A) to initiate private actions for full or partial *contribution* from nonsettling PRPs by way of impleader or an independent action. *See* 42 U.S.C. § 9613(f).[5] Thus, targeted PRPs, relying on the ultimate financial accountability of more "culpable" PRPs, are encouraged to initiate prompt response efforts, at their own expense, in cooperation with the EPA. *See* H.R. Rep. No. 253, 99th Cong., 1st Sess. 80, *reprinted in* 1986 U.S.C.C.A.N. 2835 ("Private parties may be more willing to assume the financial responsibility for some or all of the cleanup if they are assured that they can seek contribution from others."); *In re Dant & Russell, Inc.*, 951 F.2d 246, 248 (9th Cir. 1991).

On the other hand, Bankruptcy Code § 502(e)(1)(B) often

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5. Section 9613(f)(1) provides:

> Any person may seek contribution from any other person who is liable or potentially liable under section [9607(a)], during or following any civil action under section [9606] or under section [9607(a)]. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as he court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section [9606] or section [9607].

42 U.S.C. § 9613(f).

serves to forestall CERCLA's intended equitable allocation of responsibility, as occurred in this case when the bankruptcy court disallowed Juniper's estimated claim for $6.2 million in anticipated future CERCLA response costs. Section 502(e)(1)(B) provides, in pertinent part:

> [T]he court shall disallow any claim for reimbursement or contribution of an entity [*viz.*, Juniper] that is liable with the debtor [Hemingway-Bristol] on or has secured, the claim of a creditor [EPA], to the extent that —
> . . . .
>
> > (B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution . . . .

11 U.S.C. § 502(e)(1)(B). There can be little doubt that, but for section 502(e)(1)(B), the Hemingway-Bristol estate would share some measure of financial responsibility for the anticipated $6.2 million in future response costs on which the Juniper claim is based.

Nevertheless, section 502(e)(1)(B) would mandate disallowance of the Juniper claim against the Hemingway-Bristol chapter 7 estate if Juniper is jointly liable with the Hemingway-Bristol estate on the *same* "debt" for estimated future CERCLA response costs to EPA, and Juniper's right to payment on its claim — denominated a claim for reimbursement or contribution — remained "contingent" at the time of its disallowance. *See In re Provincetown-Boston Airlines*, 72 B.R. 307, 309 (Bankr. M.D. Fla.

1987). The bankruptcy court, citing *In re Charter Co.*, 862 F.2d 1500 (11th Cir. 1989), held that the Juniper claim met all three criteria for disallowance under section 502(e)(1)(B). First, Juniper denominated its claim as one for "indemnification" or "contribution." *But see infra* note 22. Second, Juniper and Hemingway-Bristol are "liable" to the EPA for future CERCLA response costs (hereinafter: the "EPA debt") because all three entities were designated PRPs by the EPA. Third, the Juniper claim is "contingent" because the EPA has issued no further cleanup orders against Juniper; hence, additional cleanup of the facility *may* not be required. *In re Hemingway Transp.*, 105 B.R. at 177-78.

2. Applicability of Section 502(e)(1)(B) to CERCLA Claims.

Section 502(e)(1)(B) was enacted for one purpose — "to prevent[] *competition between a creditor and his guarantor* for the limited proceeds of the estate." H.R. Rep. No. 595, 95th Cong., 1st Sess. 354 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 65 (1978) (emphasis added). Normally, section 502(e)(1)(B) is invoked against claims based on debts or obligations arising from voluntary contractual relationships. Even in the context of a CERCLA-based, quasi-"tort" obligation, however, the practical need for section 502(e)(1)(B) is evident; that is, but for section 502(e)(1)(B), *see infra* note 6, an estimation of Juniper's claim for anticipated response costs, *see* 11 U.S.C. § 502(c)(1), would entitle Juniper to share in the distribution of the insolvent chapter 7 estate under Bankruptcy Code 726(a), 11 U.S.C. § 726(a), *see, e.g., In re Butterworth*, 50 B.R. 320, 322 (Bankr. W.D. Nich. 1984), notwithstanding that its claim remained "contingent" until such time (if ever) as EPA were to call upon Juniper to pay any future CERCLA response costs incurred for further cleanup or remediation of the facility.

The Code's expansive definition of "claim" permits automatic allowance of most "contingent" claims, *see* Bankruptcy Code §§ 101(4), 502(a), 11 U.S.C. §§ 101(4), 502(a), against a chapter 7 estate upon timely filing, *see id.* §§ 501, 726; Fed. R. Bankr. P. 3002(c). The bankruptcy court simply estimates the amount of the claim for purposes of its allowance, *see id.* § 502(c)(1), discounting its value to reflect the uncertainty of the contingency, in order to enable the holder to share in the distribution of the insolvent estate.[6] On the other hand, where the filing of a contingent claim for contribution or reimbursement entails risk that the assets of the chapter 7 estate will be exposed to "double-dipping" by holders of the same underlying claim against the estate, section 502(e)(1)(B) mandates disallowance of the contingent claim. The sole purpose served by section 502(e)(1)(B) is to preclude redundant recoveries on identical claims against insolvent estates in violation of the fundamental Code policy fostering equitable distribution among all creditors of the same class. The "double-dipping" threat in the present case would result from the allowance and estimation of Juniper's contingent claim,

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6. Under CERCLA § 9607(a)(4)(B), *see* pp. 32-35 *infra*, "contribution" relief is restricted to damages for *past* response costs (*i.e.*, costs already "incurred"). On the other hand, section 9613(g)(2) authorizes a declaratory judgment action to determine liability for response costs which "will be binding on any subsequent action or actions to recover further response costs or damages," a form of relief plainly encompassed within Juniper's amended complaint. *See In re Chateaugay Corp.*, 944 F.2d at 1008 (noting that, notwithstanding CERCLA's ban on pre-enforcement judicial review, a bankruptcy court may estimate CERCLA claims pursuant to Bankruptcy Code § 502(c)(1), "with ultimate liquidation of the claims to await the outcome of normal CERCLA enforcement proceedings"). A "contingent" claim predicated on an otherwise valid declaratory judgment entered pursuant to section 9613(g)(2) would be subject to estimation. *See* Bankruptcy Code § 502(c)(1), 11 U.S.C. § 502(c)(1) ("There shall be estimated for purposes of allowance under this section . . . any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case . . . .").

and the allowance of an EPA claim, for the same future CERCLA response costs against the chapter 7 estate.

Section 502(e)(1)(B) is a fair and reasonable measure as applied against a contract guarantor or surety. Confronted with the prospect that its contingent claim for reimbursement or contribution against a chapter 7 debtor estate may be subject to disallowance under section 502(e)(1)(B), an entity may elect to cause its contingent contract claim to become "fixed" prior to disallowance, *see* Bankruptcy Code § 502(e)(2), by itself satisfying the debt due the creditor of the debtor estate, leaving the entity as the sole holder of a claim against the estate based on that debt.[7] *See, e.g., In re Baldwin-United Corp,* 55 B.R. 885, 895 (Bankr. S.D. Ohio 1985). On the other hand, the section 502(e)(2) "fixing" option presents an especially difficult dilemma for an owner or operator of a targeted facility, such as Juniper, involved in a Superfund contribution action. The onerous CERCLA remediation process may take years to complete, leaving PRPs holding the bag; that is, holding *unallowable* contingent claims for contribution or reimbursement against the chapter 7 estate, claims typically totaling millions of dollars. In such circumstances, section 502(e)(1)(B) may operate to preclude innocent PRPs from

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7. Section 502(e)(2) provides.

> A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

11 U.S.C. § 502(e)(2).

recovering CERCLA response costs from a chapter 7 estate even though the estate clearly is responsible for all or part of the environmental contamination. If the EPA opts to refrain from participating in any distribution from the chapter 7 estate, as it may do simply by not filing a proof of claim, Juniper may end up as the only potential EPA enforcement-action target still left standing and solvent.[8] Thus, sometimes the fundamental policy embodied in Bankruptcy Code § 502(e)(1)(B) may promote an expeditious administration of the chapter 7 estate, *see In re American Continental Corp.*, 119 B.R. 216, 217 (Bankr. D. Ariz. 1990), at the expense of a fundamental CERCLA policy: the equitable allocation of environmental cleanup costs among all responsible parties.

Although section 502(e)(1)(B) may have been devised *primarily* with contract-based codebtor relationships in mind (*e.g.*, guaranties, suretyships), however, its language ("liable with") has been found too plain and inclusive to exempt "joint and several" tort-based obligations from disallowance, *see, e.g., In re American Continental,* 119 B.R. at 217; *In re Pacor, Inc.*, 110 B.R. 686, 688 (E.D. Pa. 1990); *In re Wedtech Corp.*, 87 B.R. 279, 284 (Bankr. S.D.N.Y. 1988), and the Bankruptcy Code elsewhere carves out no exception for this variety of co-obligation. Moreover, even though

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8. EPA enforcement actions generally are excepted from the automatic stay provisions. *See* Bankruptcy Code § 362(b)(4), 11 U.S.C. § 362(b)(4); *New York v. Exxon Corp.*, 932 F.2d 1020, 1024-25 (2d Cir. 1991). Even were the EPA to reduce to judgment its claim for prepetition damages against the chapter 7 debtors, however, the judgment would not be enforceable against the debtors' estate except through the normal claim allowance process. *See* Bankruptcy Code § 362(b)(5), 11 U.S.C. § 362(b)(5). Moreover, corporate debtors cannot receive a discharge, *see id.* § 727(a)(1), 11 U.S.C. § 727(a)(1) ("The court shall grant the debtor a discharge, unless . . . the debtor is not an individual . . . ."). Consequently, virtually all such chapter 7 proceedings end with the debtor in dissolution and its corporate cupboard bare.

CERCLA and SARA postdate the enactment of Bankruptcy Code § 502(e), and plainly envision private rights of action for CERCLA contribution as inducements to spontaneous private cleanup efforts by PRPs, neither environmental statute alludes to the Bankruptcy Code, let alone exempts CERCLA contribution claims from the Code's normal claim procedures. Thus, notwithstanding the purposive liberality with which courts are to construe CERCLA's remedial provisions, *see Kayser-Roth,* 910 F.2d at 26 (" '[W]e will not interpret section 9607(a) in any way that apparently frustrates the statute's goals.' ") (citation omitted), Bankruptcy Code § 502(e)(1)(B) obliges a construction consistent with its plain terms. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988) ("[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.").

Finally, we discern no inherent incompatibility between section 502(e)(1)(B) and the congressional policies underlying CERCLA, such as might enable a court reasonably to conclude that Congress implicitly exempted CERCLA co-obligation claims. Although on occasion section 502(e)(1)(B) may impede CERCLA's *subsidiary* policy of promoting equitable allocations of environmental cleanup costs among responsible parties, pre-"fixing" disallowance does not conflict with CERCLA's *primary* goal — encouraging targeted PRPs to initiate cleanup efforts as expeditiously as practicable in the expectation that their contingent claims may become "fixed" in time for allowance against the debtor estate. *See In re Charter Co.,* 862 F.2d at 1504 (noting obvious environmental benefit from efforts to "fix" contingent claims prior to the closing of the bankruptcy case); *see also supra* note 7.

Accordingly, we conclude that Congress did not exempt CERCLA claims from disallowance under section 502(e)(1)(B).

3. Burdens of Proof in Section 502(e)(1)(B) Litigation.

In the litigation of a section 502(e)(1)(B) objection to a contingent claim, however, the proper allocation of burdens of proof and production may be decisive. A proof of claim which comports with the requirements of Bankruptcy Rule 3001(f) constitutes *prima facie* evidence of the validity and amount of the claim. *See* Fed. R. Bankr. P. 3001(f). The interposition of an objection does not deprive the proof of claim of presumptive validity unless the objection is supported by *substantial evidence. Norton Bankruptcy Law & Practice, Bankruptcy Rules* at 191 (1992); *see also In re Beverages Int'l, Ltd.*, 50 B.R. 273, 276 (D. Mass. 1985). Once the trustee manages the initial burden of producing substantial evidence, however, the ultimate risk of nonpersuasion as to the allowability of the claim resides with the party asserting the claim. *See Bankruptcy Rules*, at 191-92; *see also In re VTN, Inc.*, 69 B.R. 1005, 1006 (Bankr. S.D. Fla. 1987). In the present case, therefore, the chapter 7 trustee was required to come forward with substantial evidence that Juniper's claim is one for CERCLA "contribution," which would implicate two related questions: (1) whether Hemingway-Bristol is contingently "liable" to the EPA for future response costs, and (2) whether Juniper is "liable" to the EPA on the same "debt."

4. Hemingway-Bristol "Liability" on Joint Obligation.

At the time it allowed Juniper's claim for *past* response costs, the bankruptcy court determined that Hemingway-Bristol had owned or operated the facility when the passive "disposal" of hazardous substances occurred and that Hemingway-Bristol had actual knowledge of the presence of the leaking barrels. Hence, Hemingway-Bristol is a "covered person," strictly liable to the EPA for future response costs pursuant to 42 U.S.C. § 9607(a)(4)(A).

Juniper nonetheless suggests that the term "liable with" should be interpreted in light of the singular legislative purpose underlying the section 502(e)(1)(B) contingent claim disallowance provision. Like any other claim for contribution, says Juniper, its claim for future CERCLA response costs could pose no "double-dipping" threat were the EPA, for whatever reason, not to participate in any distribution from the chapter 7 estate. Moreover, the EPA has elected not to assert a claim against the estate, despite considerable prodding by Juniper. Rather, the EPA repeatedly has manifested its intention to forego any immediate claim against the chapter 7 estate in favor of administrative enforcement actions against other PRPs, such as Juniper.[9] The trustee responds that the literal language of section 502(e)(1)(B) directs disallowance of the codebtor's [Juniper's] contingent claim even though the creditor [EPA] has not filed a proof of claim by the time the codebtor's claim is considered for allowance.

Section 502(e)(1) directs disallowance of the claim of a codebtor who is *liable with the debtor* on the "claim of a creditor." The pivotal terms — "claim" and "creditor" — are defined. A "claim" is a "*right* to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Bankruptcy Code § 101(4), 11 U.S.C. § 101(4) (emphasis added). A "creditor" is an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." *Id.* §§ 101(9), 301 ("The commencement

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9. In a May 1987 letter to Juniper, the EPA suggested that it had already exercised its discretion to refrain from asserting an enforcement action against the chapter 7 estate, at least as of that time. Two years later, however, the EPA sent PRP notices to Hemingway and Bristol.

of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.").

The EPA presumably holds a prepetition claim against the chapter 7 estate, since its contingent "right to payment" accrued while Bristol and Hemingway owned or operated the facility at which the hazardous waste "disposal" occurred. *Cf. In re Chateaugay,* 944 F.2d at 1002-06 (EPA claim for CERCLA response costs is a prepetition claim if the contamination occurred prior to the petition, without regard to when EPA discovered contamination, or incurred response costs). Although section 502(e)(1)(B) plainly does not require that a creditor's right to payment be evidenced by a timely proof of claim, or a previously allowed claim, *see In re Wedtech Corp.*, 85 B.R. 285, 289 (Bankr. S.D.N.Y. 1988), it is nonetheless incumbent on the trustee to produce substantial evidence of the existence of a right to payment on the part of the creditor.

The co-liability clause in section 502(e)(1), *viz.*, "liable with the debtor," interpreted in light of its singular purpose, might permit allowance of a non-fixed codebtor claim for CERCLA contribution if the creditor were *foreclosed* from participating in any distribution from the estate under Bankruptcy Code § 726(a). Nevertheless, though we reject the trustee's contention that the EPA might yet demonstrate "excusable neglect" warranting an extension of time to file a proof of claim,[10] we must examine other

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10. In a chapter 7 case, proofs of claim must be filed within ninety days after the first date set for the first meeting of creditors. Fed. R. Bankr. P. 3002(c). *See In re Chirillo*, 84 B.R. 120, 122 (Bankr. N.D. Ill. 1988). Since the EPA could no longer satisfy any of the six conditions for extension of the ninety-day bar date set forth in Bankruptcy Rule 3002(c), it is precluded from asserting a timely proof of claim against the chapter 7 estate. *See* Fed. R. Bankr. P. 9006(b)(1). Rule 9006(b) plainly precludes resort to Rule 9006(b)(1) to extend a time period prescribed in Rule

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means which may remain open to EPA's participation in any chapter 7 distribution.

The EPA may participate in a distribution to unsecured creditors under section 726(a)(2)(C) if it was never scheduled as a "creditor" of the estate, and had no actual knowledge of the proceedings in time to file a proof of claim. *See In re Global Precious Metals, Inc.*, 143 B.R. 204, 205-06 (Bankr. N.D. Ill. 1992) (chapter 7).[11] Thus, a remote "double-dipping" prospect would remain if Juniper's claim were to be allowed, as it is conceivable that EPA might yet file an allowable claim.[12]

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3002(c), except "to the extent and under the conditions stated in [Rule 3002(c)]." *Id.* at 9006(b)(3).

11. Bankruptcy Code § 726(a)(2)(C) provides for "payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is . . . tardily filed under section 501(a) of this title, if (i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and (ii) proof of such claim is filed in time to permit payment of such claim." 11 U.S.C. § 726(a)(2)(C). The appellate record does not disclose whether EPA was listed as a creditor. In addition, it is conceivable, though unlikely, that EPA's CERCLA claim might be entitled to share in any subordinate distribution under section 726(a)(3), as an "allowed unsecured claim proof of which is tardily filed," even if EPA was scheduled, or had actual notice of the case prior to the bar date. *See In re Melenyzer*, 140 B.R. 143, 156 n.42 (Bankr. W.D. Tex. 1992) (chapter 7).

12. Of course, the bankruptcy court might condition its allowance of a codebtor's claim on the ultimate failure of the creditor to file a proof of claim. *See* Bankruptcy Code § 502(j), 11 U.S.C. § 502(j) ("A claim that has been allowed or disallowed may be reconsidered for cause."). Instead of automatic disallowance, some courts have suggested that the bankruptcy court sharply discount the codebtor's claim to offset this all-or-nothing contingency, or direct that any distribution to the codebtor be placed in trust, to be expended only to reduce the common debt. *See In re*
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In this case, however, the harsh results occasioned by Bankruptcy Code 502(e)(1)(B) are mitigable through recourse to Bankruptcy Code 501(c), which provides that, "[i]f a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim." *See also* Fed. R. Bankr. P. 3004. Although section 501(c) is permissive ("may file"), rather than mandatory, and is designed principally to prevent creditors from depriving debtors of the benefit of a discharge under Bankruptcy Code § 727, 11 U.S.C. § 727, *cf. supra* note 8, in these circumstances there are sound reasons to require the chapter 7 trustee to shoulder the initial burden of filing a surrogate claim in behalf of the EPA as a precondition to obtaining simultaneous disallowance of Juniper's contingent claim under section 501(e)(1)(B).

First, even if the chapter 7 trustee were to decline to act as an EPA surrogate, Juniper could force the trustee's hand. Under a parallel Code provision, Juniper itself would be permitted to file a surrogate claim for the EPA. *See* Bankruptcy Code § 501(b), 11 U.S.C. § 501(b) ("If a creditor [EPA] does not timely file a proof of such creditor's claim, an entity [Juniper] that is liable to such creditor with the debtor . . . may file a proof of such claim.").[13] Were

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Allegheny Int'l., Inc., 126 B.R. 919, 924 (W.D. Pa. 1991), *aff'd*, 950 F.2d 721 (3d Cir. 1991). However, these options find little support in the categorical language of section 502(e)(1)(B).

13. The equitable considerations underlying the section 501(b) surrogate-claim procedure have been described as follows:

> Section 501(b) and Rule 3005 protect the codebtor against the danger that the creditor, faced with the bankruptcy of the prime debtor, might decide to rely on the solvency of the codebtor and therefore, to abstain

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it to resort to the surrogate-claim procedure, Juniper would be required to show simply that "the original debt [due EPA by Hemingway-Bristol would] be diminished by the amount of the distribution [to the EPA on the surrogate claim]." Fed. R. Bankr. P. 3005(a). Of course, even this modest burden would be obviated if the surrogate claim were to be superseded by the EPA's filing of its own proof of claim. *See id.* [14]

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> from filing a proof of claim. In such a case, while there might be a prospect of securing at least partial satisfaction from the assets of the debtor, the creditor would forego this possibility and merely proceed with his claim against the codebtor. By the time the creditor decided to take such action, any period fixed for the filing of claims might have elapsed. Indeed, the debtor's estate might have been fully administered by the trustee so that the codebtor would be left without the possibility of even partial reimbursement to the extent he has satisfied the claim of the debtor's creditor. The debtor's discharge would remove the possibility that his codebtor could secure indemnification from him at some future time. . . . [T]he unwillingness of th[e] creditor to take the necessary steps in the administration of bankruptcy to insure . . . participation [in distribution of the debtor's assets] would not deny the ability of the codebtor to do so.

See Lawrence D. King, *Collier on Bankruptcy* ¶ 509.02, at 509-6 (15th ed. 1991) [hereinafter *Collier on Bankruptcy*].

14. Although the EPA can no longer file a "timely" proof of claim now that the bar date has passed, *see supra* note 10, its forbearance triggers the trustee's and Juniper's rights to file a proof of claim in EPA's behalf. Under Bankruptcy Rules 3004 and 3005(a), the trustee and Juniper normally would have only thirty days from the bar date to file their surrogate claims. But insofar as EPA "did not have notice or actual knowledge of the case in time for timely filing of a proof of

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More importantly, mandatory resort to the trustee's option to file a surrogate proof of claim under section 501(c) more readily comports with the allocation of the burden of proof under section 502(e)(1)(B), which would require the trustee to come forward with *substantial* support for the section 502(e)(1)(B) objection to Juniper's proof of claim, and hence, substantial evidence that Hemingway and Bristol were "liable" to the EPA. *See supra* Section II.A.3. In addition, the trustee has title and ready access to the debtors' records, *see* Bankruptcy Code § 521(4), 11 U.S.C. § 521(4) ("[D]ebtor shall . . . surrender to trustee all property of the estate, including books, documents, records, and papers . . . ."); *In re Bentley*, 120 B.R. 712, 714 (S.D.N.Y. 1990), and the right to require the debtors' officers to submit to examination, *see* Bankruptcy Code § 521(3), 11 U.S.C. § 521(3) ("[D]ebtor shall . . . cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties . . . ."); Fed. R. Bankr. P. 4002(4) (Debtor must "cooperate with the trustee in . . . the examination of proofs of claim . . . ."); *In re Neese*, 137 B.R. 797, 801 (C.D. Cal. 1992) (" '[C]ooperate' is a broad term . . . ."). Thus, the trustee is in a far better position than Juniper to ferret out evidence relevant to the EPA's claim against the debtors.

Although disallowance of Juniper's CERCLA claim under section 502(e)(1)(B) is not strictly foreclosed by EPA's failure to file timely proof of its claim, we cannot overlook the fact that the trustee's reliance on section 502(e)(1)(B) may occasion a pointless

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. . . claim," Bankruptcy Code § 726(a)(2)(C)(i), *see also supra* note 11 and accompanying text, the EPA can yet file a belated claim that can receive payment along with other timely-filed unsecured claims, so long as "proof of such claim is filed in time to permit payment of such claim." *Id.* § 726(a)(2)(C)(ii). Thus, the trustee and Juniper, as EPA surrogates, can avail themselves of the section 726(a)(2)(C) "extended filing" provision.

financial loss to Juniper and result in a windfall to the chapter 7 estate, notwithstanding Juniper's best efforts to induce EPA to file its claim. In this vein, we note that resort to subsections 501(b) and (c) would not compel EPA's participation in the bankruptcy proceedings, *cf. In re Hemingway Transp.*, 70 B.R. 549 (Bankr. D. Mass. 1987) (finding sovereign immunity would preclude mandatory *joinder* of EPA as party); *cf. also infra* note 26, but nevertheless would compel a set-aside for EPA's benefit at the time of distribution regardless of its decision to refrain from filing a claim against the chapter 7 estate. The distribution to EPA would result in a reduction in the total indebtedness to EPA for which Juniper and the chapter 7 estate are alleged to be co-liable. In our view, the EPA's recalcitrance, whatever its administrative justification, provides no relevant legal or equitable basis for barring resort to the alternative surrogate-claim filing procedure authorized under subsections 501(b) and (c).

Accordingly, we vacate the bankruptcy court order disallowing Juniper's claim under section 502(e)(1)(B). On remand, the bankruptcy court should prescribe a reasonable bar date by which the chapter 7 trustee must elect whether to file a surrogate EPA claim pursuant to Bankruptcy Code § 501(c), without prejudice to Juniper's right to submit a surrogate claim under subsection 502(b) as well.[15] Should the trustee not file a

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15. Unlike a creditor filing in its own behalf, or a trustee seeking to avail the debtor of the full benefit of a chapter 7 discharge, in this case the chapter 7 trustee may have little incentive to maximize any surrogate claim in behalf of EPA, thus depleting any pro-rata dividend available to other unsecured creditors. A similar problem may arise if any superseding proof of claim filed by EPA were to understate (in Juniper's view) the chapter 7 debtors' share of the CERCLA obligation. We do not construe subsections 501(b) and (c) as suggesting that the trustee could preempt a surrogate EPA claim by Juniper under section 501(b) asserting that the chapter 7 estate's CERCLA liability to EPA is greater than that asserted in the trustee's section 501(c)

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timely surrogate claim (and should Juniper not do so), the section 502(e)(1)(B) objection should be dismissed, and the court should estimate Juniper's direct claim against the chapter 7 estate pursuant to normal claimallowance procedures. *See* Bankruptcy Code § 502(c).

5. Juniper's "Liability" on Joint Obligation.

In the event the trustee should file a surrogate claim in behalf of the EPA pursuant to sections 501(c) and 726(a)(2)(C) following remand, we outline the standards governing its consideration by the bankruptcy court.

Juniper's "contribution" claim differs in one important respect from codebtor claims normally subjected to disallowance under section 502(e)(1)(B). In the typical contractual relationship between a principal and its surety or guarantor, the codebtor's (surety's or guarantor's) obligation on the common debt arises at the same time as the creditor's (principal's) "right to payment" from the debtor — *during the prepetition period* — which necessarily means that both the creditor and the codebtor hold *prepetition* claims against the debtor estate. Here, on the other hand, regardless whether the EPA has a prepetition or a postpetition claim, Juniper's "right to payment" from Hemingway-Bristol arose, *at the earliest,* when it purchased the facility from the Hemingway-Bristol chapter 11 estate in April 1983. Only then did Juniper become an "owner and operator" of the contaminated facility, hence a "covered person" under

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surrogate claim. Rather, the bankruptcy court should entertain evidence from the trustee and Juniper, for the purpose of estimating the value of the EPA claim under section 502(c).

CERCLA.[16] Since Juniper undeniably holds a *postpetition* "claim" Bankruptcy Code §§ 101(9), 301, 11 U.S.C. § 101(9), 301, its "proof of claim" under Bankruptcy Code §§ 501 and 502 is no less readily — and presumably even more accurately — characterized as "a request for payment of an administrative expense" under Bankruptcy Code § 503(a). *See* Bankruptcy Code § 348(d), 11 U.S.C. § 348(d) (providing that claims arising after the filing of a chapter 11 petition and before conversion to chapter 7 shall be treated as prepetition claims, unless they qualify as "administrative expenses" under section 503(b)).[17]

Bankruptcy Code § 503(a)(1)(A) enables an entity to file a request for payment of an administrative expense, including "the actual, necessary costs and expenses of preserving the estate." "As

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16. The bankruptcy court implicitly acknowledged as much when it approved Juniper's request for *past* response costs as an administrative expense: "Juniper's cause of action under CERCLA arose when the property containing the drums was transferred to Juniper or, alternatively, when Juniper expended money in response to the EPA's administrative order." *In re Hemingway Transp.*, 73 B.R. at 503.

17. Courts have long recognized a category of allowable administrative expenses resulting in no discernible benefit to the debtor estate, *see In re Charlesbank Laundry, Inc.*, 755 F.2d 200 (1st Cir. 1985), in instances where fundamental fairness required that the claimant's right to distribution take precedence over the rights of general creditors. *See Reading Co. v. Brown*, 391 U.S. 471 (1968). In *Reading*, several business firms, whose premises were damaged by a fire negligently caused by the receiver appointed to operate a Chapter XI business, requested that their fire-loss claims be allowed as administrative expenses of the Chapter XI estate, notwithstanding the fact that the losses sustained as a result of the fire resulted in no "benefit" to the Chapter XI estate. Noting the "decisive, statutory objective [of] fairness to all persons having claims against the insolvent," *Reading*, 391 U.S. at 477, the Supreme Court held that the claims for postpetition fire loss were allowable as costs of administration. Its rationale was equitable in nature: unsecured creditors in a Chapter XI reorganization anticipate that their agreement to defer receipt of payment

(Cont'd)

a general rule, a request for priority payment of an administrative expense pursuant to Bankruptcy Code § 503(a) may qualify if (1) the right to payment arose from a postpetition transaction with the debtor estate, rather than from a prepetition transaction with the debtor, and (2) the consideration supporting the right to payment was beneficial to the estate of the debtor." *In re Hemingway Transp., Inc.*, 954 F.2d 1, 5 (lst Cir. 1991) (citing *In re Mammoth Mart, Inc.*, 536 F.2d 950, 954 (ist Cir. 1976)). The trustee argues that administrative expense priority under *Mammoth Mart* is

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(Cont'd)
on their prepetition claims may facilitate the reorganization debtor's ultimate rehabilitation, thereby enhancing their prospects for recovery on their prepetition claims. Unlike holders of prepetition claims, however, the firms whose business premises were damaged by the postpetition fire negligently caused by the receiver had "the insolvent business [involuntarily] thrust upon them by operation of law." *Id.* Similarly, in *Charlesbank*, we extended *Reading* to postpetition fines imposed on a chapter 11 estate for deliberate disregard of an injunction. *See Charlesbank*, 755 F.2d at 203.

In citing *Reading* and *Charlesbank* as support for its provisional decision granting Juniper administrative priority for its postpetition contribution claims, the bankruptcy court focused entirely on the *debtors'* failure to disclose the environmental risk prior to the 1983 sale, and the perceived "unfairness" in the "debtor attempting to transfer its liability or potential for liability under state or federal environmental laws" in those circumstances. *See In re Hemingway Transp.*, 73 B.R. at 504. Thus interpreted, *Reading* might permit Juniper to recover the entire cost of its extant "injury" — or the past and future costs of remediation — despite the fact that it has yet to incur some of these response costs. Unlike the injured parties in *Reading* and *Charlesbank*, however, Juniper dealt *voluntarily* on a contractual basis with the chapter 11 estate. No principle of fundamental fairness would entitle Juniper to administrative priority over other unsecured creditors of the Hemingway-Bristol estate if it failed to exercise due diligence in all the circumstances to protect itself, from the outset, against any imposition of CERCLA joint and several liability. In addition, lack of due diligence would, for reasons explained below at pp. 36-38, prevent Juniper from escaping the strictures of section 502(e)(1)(B)'s "fixing" requirement.

wholly unavailable to Juniper on its claims for past and future response costs, as Juniper's right to contribution from the chapter 7 estate was not supported by consideration (*i.e.*, Juniper's outlay of response costs) which could "benefit" the estate. Thus, the trustee points out that the contaminated facility was no longer property of the chapter 11 estate, hence Juniper's incurrence of response costs would not bring the estate into compliance with federal or state environmental regulations. *Cf. In re Stevens,* 68 B.R. 774, 783 (D. Me. 1987) (finding that the State's claim for cleanup expenses incurred in substitute fulfillment of the trustee's legal obligation was entitled to administrative expense priority, where the trustee, who would be prohibited from exercising his power of abandonment in contravention of state environmental protection laws, was still in "possession" of property posing an "imminent and identifiable danger" to public health and safety; contrasting case in which trustee had already been "dispossessed" of waste site at time of government-financed cleanup); *In re T.P. Long Chem., Inc.*, 45 B.R. 278, 284-85 (Bankr. N.D. Ohio 1985). Nor could the CERCLA response costs incurred by Juniper "benefit" the chapter 11 estate while the estate remained jointly and severally liable on the EPA debt. Although we agree that Juniper's incurrence of CERCLA *response costs* might not benefit the estate, on the facts of this case we cannot agree that *Mammoth Mart* priority is altogether unavailable to Juniper.

In the context of their arm's-length purchase-sale transaction in 1983, we must presume that Juniper and the chapter 11 estate were cognizant of the federal and state environmental laws then in effect, and that, notwithstanding Juniper's resulting status as an "owner or operator" of the contaminated facility, the chapter 11 estate could remain liable for any response costs later incurred by Juniper and for which the debtors (or the debtor estate) were liable under CERCLA section 9607(a), an obligation explicitly provided

for presently in 42 U.S.C. §§ 9607(a)(4)(B) and 9613(f). *See O'Neil*, 883 F.2d at 179 (noting that SARA contribution provisions merely "codif[ied] [a remedy] that most courts had concluded was implicit in the 1980 Act"); *Marden Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457 n.3 (9th Cir. 1986) (collecting pre-SARA caselaw recognizing implicit right of contribution in CERCLA). There is no record evidence that the estate either contracted away its obligation to contribute, or bargained for a right to indemnification from Juniper. *See* 42 U.S.C. § 9607(e) (purported transfers of CERCLA liability cannot exonerate transferor, but indemnification agreements are permissible). Similarly, to the extent that the $1.6 million purchase price for the facility presumptively reflected the parties' allocation of the risks relating to these contribution costs, the $1.6 million constituted "consideration" supporting Juniper's right to payment for contribution for response costs from the estate. Obviously, this substantial infusion of cash benefitted the chapter 11 rehabilitation effort. Thus, the $1.6 million in purchase monies constituted the requisite baseline "consideration" for Juniper's right to contribution; and response costs subsequently incurred by Juniper a mere maturation of that right, immaterial for *Mammoth Mart* purposes.

On the other hand, we agree that *Mammoth Mart* priority is unavailing to Juniper insofar as its right to contribution for future response costs remains "contingent" at the time the bankruptcy court considers Juniper's claim for allowance against the debtor estate. Only "actual" administrative expenses, not contingent expenses, are entitled to priority payment under Bankruptcy Code § 503(b)(1)(A). Even though Juniper's postpetition contribution claim, *once allowed*, would be entitled to priority treatment under section 503(b), the parallel restrictions in section 502(e)(1)(B) pose an additional hurdle. Under its clear terms, section

502(e)(1)(B) does not apply exclusively to "creditors," or in other words, to holders of *prepetition* claims for reimbursement or contribution. Section 502(e)(1)(B) refers to the holder of the claim as an "entity," not as a "creditor" of the estate.[18] Accordingly, Juniper's priority "claim for reimbursement or contribution" would be allowable if *either*: (1) Juniper and the chapter 11 estate are not strictly, jointly, and severally liable ("liable with the debtor") on the EPA debt under the liability provisions of the CERCLA statute, *or* (2) Juniper's response costs have become "fixed" and "actual" (*i.e.*, have been expended by Juniper for remediation or paid over to the EPA) by the time Juniper's claim is considered for disallowance. As Juniper's contingent claim for future response costs is, by definition, not "fixed," Juniper cannot escape the consequences of section 502(e)(1)(B) unless it is not strictly and jointly "liable" with Hemingway-Bristol on the EPA debt. *Cf. infra* Section II.C. (*Mammoth Mart* administrative expense priority would attach to Juniper's "fixed" claim for *past* response costs). We turn, therefore, to the question of Juniper's alleged liability to the EPA.

The threshold question is whether Juniper is even asserting a *direct* CERCLA claim against the chapter 7 estate, or merely a *derivative* claim for "contribution" from the chapter 7 estate. CERCLA section 9613(f) is the sole statutory basis for a right to "contribution," *see supra* note 5 and accompanying text, but CERCLA prescribes other remedial provisions as well. Unlike section 9613(f), a private right of action for CERCLA response costs under section 9607(a)(4)(B) is available to "*any person*" who incurs necessary response costs, presumably without regard to whether the plaintiff is an EPA target, *i.e.*, a PRP or "covered person" under section 9607(a). *See* 42 U.S.C. § 9601(21)

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18. "Creditor" means an "entity that has a claim that arose at the time of or before the order of relief." Bankruptcy Code § 101(9), 11 U.S.C. § 101(9).

("person" includes "corporation"). Section 9607(a)(4)(B) simply requires the private-action plaintiff to prove that (1) a release of a "hazardous substance" from the subject "facility" occurred or is threatened; (2) the defendant comes within any of four categories of "covered persons," which include current owners or operators of the facility, *see* 42 U.S.C. § 9601(9)(B), as well as the owners and operators of the facility at the time the contamination occurred; (3) the release or threatened release has caused (or may cause) the claimant to incur response costs;[19] and (4) the response costs are "necessary" and "consistent with the national contingency plan." *See Dedham Water Co. v. Cumberland Farms Dairy Inc.*, 889 F.2d 1146, 1150 (1st Cir. 1989).[20]

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19. Response costs," 42 U.S.C. § 9601(25), include costs incurred in "removal" actions, which address immediate threats to public health and safety caused by hazardous substances, 42 U.S.C. § 9601(23), and costs incurred in "remedial" actions, directed at long-term or permanent remediation of the contamination, 42 U.S.C. § 9601(24).

20. Section 9607(a) provides, in pertinent part:

> (1) [T]he owner and operator of a vessel or a facility,
>
> (2) [A]ny person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . shall be liable for —
>
> > (A) all costs of removal or remedial action incurred by the United States Government or a State . . .
> >
> > (B) any other *necessary costs of response* incurred by *any other person* consistent with the national contingency plan.

42 U.S.C. § 9607(a)(2)(B) (emphasis added).

For instance, a *neighboring* landowner, who is neither a current nor a past owner or operator of the contaminated facility, hence not strictly liable as a "covered person" under section 9607(a), may incur response costs as a result of a threatened release and potential migration of hazardous substances from an adjoining property, and may assert a right of action under section 9607(a)(4)(B). *See, e.g., Dedham Water,* 889 F.2d at 1146-48 (noting that water utility would have cause of action under section 9607(a)(4)(B) against neighboring property owner for response costs relating to threatened release). On the other hand, in the event the private-action plaintiff itself is potentially "liable" to the EPA for response costs, and thus is akin to a joint "tortfeasor," section 9607(a)(4)(B) serves as the *pre-enforcement* analog to the "impleader" contribution action permitted under section 9613(f). *See* 42 U.S.C. § 9613(f) ("Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section [9606] or section [9607]."); *see also Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 890-91 (9th Cir. 1986) (holding that section 9607(a)(4)(B) grants private right of action for response costs, without regard to any prior EPA enforcement actions).

Because Juniper's initial complaint in the instant adversary proceeding invoked generic claims for "contribution" and "indemnification," without attribution to any statutory source, the bankruptcy court specifically requested Juniper "to amend Count I [of its complaint] to include the statutory prerequisite [sic] of 42 U.S.C. § 9607(a)(4)(B)." Although the amended complaint represents at best an imperceptible improvement over its predecessor, the bankruptcy court apparently considered it adequate to assert such a claim.[21] Juniper's amended complaint

21. The bankruptcy court opinion states: "In the context of this case, it is possible to view Juniper as a direct creditor of Hemingway and as an entity jointly liable with the Debtor." *In re Hemingway Transp.*, 105 B.R. at 175.

bears this out. It alleges that (1) Juniper is a current owner of the facility, but not that it is a "covered person" under section 9607(a); (2) Hemingway and Bristol fraudulently concealed the presence of hazardous wastes at the facility prior to the 1983 sale; and (3) Juniper neither knew nor had "reason to know" of the contamination until 1985.

The bankruptcy court concluded that Juniper, as the current "owner" of the facility, undoubtedly would be "liable" to the EPA in an enforcement action simply by virtue of its *prima facie* status as a "covered person" under section 9607(a).[22] The undefined term "liable" is common to both CERCLA 9607(a) and Bankruptcy Code § 502(e)(1)(8). Its construction presents a question of law subject to plenary review. *See In re Erin Food Servs., Inc.*, 980 F.2d 792, 794 (lst Cir. 1992) (citing *In re LaRoche*, 969 F.2d 1299, 1301 (lst Cir. 1992)).

Of course, not all "covered persons" are strictly liable for response costs. The harsh effects of the strict liability rule are

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22. The bankruptcy court based its section 502(e)(1)(B) disallowance on the ground that Juniper had denominated its claim a derivative claim for "contribution," thereby conceding its co-liability with the Hemingway-Bristol estate for future response costs. In our view, this ruling exalts form over substance, and ignores both the liberality with which pleadings must be construed and the right to plead alternative or seemingly "inconsistent" claims. *See* Fed. R. Bankr. P. 7008(a) (incorporating Fed. R. Civ. P. 8(e), providing that "[a] party may set forth two or more statements of a claim or defense *alternatively* or hypothetically . . . *regardless of consistency* . . . .") (emphasis added); *cf. also Schott Motorcycle Supply Inc. v. American Honda Motor Co.*, 976 F.2d 58, 61-62 (1st Cir. 1992). Given the comparative breadth of the section 9607(a)(4)(B) remedy, and Juniper's explicit allegation that it had no actual or constructive knowledge of the contamination at the time it purchased the facility, we think the trustee must come forward with substantial evidence from which the bankruptcy court could conclude that Juniper is a "covered person" liable to the EPA for future response costs.

subject to mitigation through resort to certain affirmative defenses. Section 9607(b) expressly provides that "[t]here shall be *no liability* under section [9607](a) . . . for a person otherwise liable who can establish by a preponderance of the evidence [the following defenses] . . . ." *See also Environmental Transp. Sys. v. Ensco, Inc.*, 969 F.2d 503, 504 n.3 (7th Cir. 1992). Section 9607(b)(3) would afford a complete defense to CERCLA liability if Juniper were to establish that (1) it acquired the facility after the initial deposit of the hazardous substances; (2) at the time of its acquisition, it did not know and had "*no reason to know*" that any hazardous substance was deposited at the facility; and (3) once the presence of the hazardous substance became known, Juniper exercised due care in the circumstances. The statute defines the term "no reason to know" as follows:

> [T]he [buyer] must have undertaken, at the time of acquisition, *all appropriate inquiry* into the previous ownership and uses of the property consistent with good commercial or customary practice *in an effort to minimize liability.* For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the [buyer], *the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information* about the property, *the obviousness of the presence or likely presence of contamination* at the property, and the ability to detect such contamination by appropriate inspection.

42 U.S.C. § 9601(35)(B) (emphasis added); *see also United States*

v. Pacific Hide & Fur Depot, Inc., 716 F. Supp. 1341, 1347 (D. Idaho 1989); *cf.* 42 U.S.C. § 9622 (g) (*de minimis* settlement provisions not applicable to owners who purchased land with actual or constructive knowledge of contamination). As an acquiring party and an owner of the facility during a period of "passive" disposal,[23] Juniper would be held to an especially stringent level of preacquisition inquiry — on the theory that an acquiring party's failure to make adequate inquiry may itself contribute to a prolongation of the contamination.[24]

Thus, under *either* section 501(e)(1)(B) *or* section 503(a), Juniper's participation in any distribution from the chapter 7 estate hinges entirely on the validity of its "innocent landowner" defense. Notwithstanding its relevance, the "innocent landowner" defense was never explicitly considered by the bankruptcy court in connection with the trustee's motion for summary judgment disallowing Juniper's CERCLA claim pursuant to section 502(e)(1)(B), nor in connection with its earlier provisional ruling on Juniper's entitlement to administrative priority. *Cf. supra* note

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23. The parties do not challenge the bankruptcy court ruling that the Hemingway-Bristol estate is "liable" for the "passive" disposal at the facility (*i.e.*, the leaking of previously generated or deposited containers of hazardous waste), even absent evidence that the chapter 7 estate contributed to the generation or the deposit of the hazardous substances in the first instance. Furthermore, the chapter 7 estate could not establish an "innocent owner" defense: the 1982 DEQE notice afforded the debtors *actual* knowledge that drums of contaminants were located at the facility. On the other hand, the bankruptcy court found that "none of the interested parties, including the Trustee, Juniper and the two courts that approved the sale, were apprised of the presence of hazardous wastes on the property, despite the DEQE action." *In re Hemingway Transp.*, 73 B.R. at 501-02.

24. The EPA informed Juniper in May 1987 that its alleged contribution to the passive disposal was undetermined because the extent of the post-1983 "contaminant plume" at the facility had yet to be ascertained.

17. The record contains mixed signals on the "innocent landowner" defense. In a May 19, 1987 letter to Juniper, the EPA opined that Juniper would not be entitled to the "innocent landowner" defense, for several reasons: Juniper (1) knew in 1983 that the facility was in close proximity (200 feet) to a larger Superfund site already included on the national priority list; (2) made no preacquisition inquiry of EPA or DEQE concerning possible contamination in the area; and (3) did not obtain available maps showing an unpaved access road to the allegedly inaccessible portion of the facility where the drums were found.

The EPA opinion is not necessarily dispositive as to the allowability of a claim or an administrative expense request. Nevertheless, after trial on the issue of Hemingway's liability for past response costs, the bankruptcy court noted (notwithstanding Juniper's contention that the drums were located in an area which was inaccessible at the time of the 1983 sale) that *"easy access* to the location of the barrels is possible along the City of Woburn's sewer easement, which parallels the MBTA tracks." *In re Hemingway Transp.*, 108 B.R. at 380 (emphasis added). The record further suggests that Juniper, an experienced land developer in the Woburn area, may have been familiar with the environmental risks posed by its acquisition of the facility, and therefore may have been cognizant that the $1.6 million purchase price reflected a discount due to contamination. *Cf. Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 90 (3d Cir. 1988) (in allocating responsibility between vendor and purchaser, court may consider any implicit discount in sale price as reflecting assumption of risk of contamination).

On the other hand, the record indicates that the bankruptcy court may have considered Juniper's responsibility for any contamination extremely minimal, especially in comparison to

Hemingway-Bristol. For example, in allowing Juniper's contribution claims for *past* response costs, the bankruptcy court allocated *total* financial responsibility to Hemingway-Bristol, *see supra* note 4, despite the fact that the court also found no evidence that Hemingway-Bristol, throughout twenty years' occupancy, ever generated or deposited hazardous wastes at the facility. The bankruptcy court further found that Juniper was never "apprised of the presence of hazardous wastes. . . ." *In re Hemingway Transp.*, 73 B.R. at 501. And, of course, discount prices are not uncommon in forced sales of the assets of insolvent estates.

Since the bankruptcy court's disallowance of Juniper's claim must be vacated on independent grounds, *see supra* Section II.A.4, on remand the trustee will have the burden to file a surrogate claim in behalf of the EPA *and* the burden to come forward with substantial evidence that Juniper is not entitled to an "innocent landowner" defense. The ultimate burden of proof on that defense, however, will remain with Juniper. The bankruptcy court should determine whether Juniper made "all appropriate" preacquisition inquiry pursuant to 42 U.S.C. § 9601(35), a factual finding which would be subject to clear error review only. Should the bankruptcy court find that Juniper did not have notice or actual knowledge of the contamination at the time it purchased the facility in 1983, Juniper's claim for past and future response costs should be estimated[25] and allowed as administrative expenses entitled to

25. Because of its earlier section 502(e) disallowance, the bankruptcy court refused to permit Juniper to introduce evidence of anticipated future cleanup costs. Although we need not decide the issue at this juncture, we note that the EPA's nonbinding preliminary allocation of responsibility may be inadmissible evidence as to the value of Juniper's claim for future response costs, *see* 42 U.S.C. § 9622(e)(3)(C) ("The nonbinding preliminary allocation of responsibility shall not be admissible as evidence in any proceeding . . . [nor] constitute an apportionment or other statement on the divisibility of harm or causation."), and, on remand, that it may be incumbent on Juniper to present other evidence of the extent of its "injury."

priority.[26] On the other hand, if Juniper did not take all appropriate steps to protect itself from CERCLA liability, its lack of diligence exposed it to the harsh consequences of strict, joint and several liability under CERCLA. In that event, Juniper's claim would be subject to the section 502(e)(2) "fixing" requirement and Juniper would not be entitled to administrative expense priority with respect to any allowable CERCLA claim.

B. Juniper's Appeal: Disallowance of Attorney Fees (42 U.S.C. § 9607(a)).

Juniper argues for an award of attorney fees pursuant to 42 U.S.C. § 9607(a)(4)(B), which makes no reference to "attorney

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26. The determination of Juniper's CERCLA "liability" by the bankruptcy court is required solely for purposes of the allowance or disallowance of Juniper's proof of claim, a core proceeding in bankruptcy, and the court cannot ignore the possibility that the EPA might yet maintain a successful enforcement action against Juniper. But unlike the holder of a *prepetition* claim for contribution, which normally must await final distribution under Bankruptcy Code § 726, Juniper would enjoy a distinct distributional advantage should it succeed in establishing its entitlement to the "innocent landowner" defense under section 9607(b)(3). The court properly could provide for the *immediate*, pre-distribution payment of Juniper's "claim" *in trust, see, e.g., In re Allegheny Int'l, Inc.*, 126 B.R. at 924 ("Creation of a trust to be expended on contingent claims is a frequently used mechanism for insuring that such funds are properly disbursed.") (citing *In re Johns-Manville Corp.*, 68 B.R. 618, 625-26 (Bankr. S.D.N.Y. 1986, *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd*, 843 F.2d 636 (2d Cir. 1988)), exclusively for "necessary" future response costs at the facility. *See* 3 *Collier on Bankruptcy* ¶ 503.01, at 503-5 (citing *In re Verco Indus., Inc.*, 20 B.R. 664, 665 (Bankr. 9th Cir. 1982) (holding that bankruptcy court has discretion to order early payment of an administrative expense)); *cf. supra* note 12. In this manner, the EPA debt would be reduced *pro tanto* by any disbursement from the trust account, thereby effecting a *de facto* "fixing" of the EPA debt should EPA later attempt to file a claim against the chapter 7 estate. *See supra* note 7.

fees" in private cost recovery actions. Juniper contends that the term "necessary costs of response" should be broadly construed to encompass attorney fee awards so as to advance CERCLA's remedial purposes by inducing PRPs to cooperate in initiating prompt cleanup efforts. We affirm on the grounds advanced in the well-reasoned district court opinion. *See In re Hemingway Transp., Inc.*, 108 B.R. at 383.

Absent an explicit statutory authorization, a party is not entitled to recover attorney fees simply because it prevailed in the litigation. *Runyon v. McCrary*, 427 U.S. 160, 185 (1976). CERCLA contains explicit provisions authorizing attorney fee awards in certain other types of actions. *See, e.g.*, 42 U.S.C. § 9610(c) (employee-whistleblowers may recover "all costs and expenses (including attorney's fees") . . . ."); *id.* § 9659(f) (prevailing parties in private citizen suits may recover costs of litigation, "including reasonable attorney and expert witness fees"). Moreover, Congress did not consider, and SARA did not include, any attorney fee award amendment applicable to the private cost recovery provision in section 9607(a)(4)(B). We therefore conclude that Congress has elected not to authorize attorney fee awards in these actions. *Cf. Dedham Water*, 972 F.2d at 461 ("[L]itigation-related expenses are, of course, not compensable as response costs incurred by private parties under CERCLA § [9607]."") (citing *Regan v. Cherry Corp.*, 706 F. Supp. 145, 149 (D.R.I. 1989)). Although a strong case might be made that attorney fee awards in private cost recovery actions promote CERCLA's remedial aims, *see, e.g., General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991), that case is one for the legislative venue. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263-64 (1975) ("[I]t would be difficult, indeed, for the court, without legislative guidance, to consider some statutes important

and others unimportant and to allow attorneys' fees only in connection with the former."); *see also U.S. Steel Supply Inc. v. Chatwins Group, Inc.*, No. 89-C20241, 1992 U.S. App. LEXIS 13722, at 45-46 (N.D. Ill. Sept. 9, 1992).

Juniper argues, nonetheless, that only a small portion of its attorney fees were incurred in preparation for the "response cost" recovery litigation itself, the greater portion having been incurred to ensure that Juniper's "response" was in compliance with the administrative order issued by the EPA. We conclude that the present claim was waived. At trial, Juniper's attorney fee billings were admitted in evidence. Juniper suggested no distinction between attorney fees incurred for litigative and administrative purposes.[27] Juniper's failure to advance the present contention below deprived the bankruptcy court of an opportunity to consider it, thereby waiving the claim. *See In re LaRoche*, 969 F.2d 1299, 1305 (lst Cir. 1992) (arguments not raised in bankruptcy court cannot be raised for first time on appeal); *In re 604 Columbus Ave. Realty Trust*, 968 F.2d 1332, 1343 (lst Cir. 1992) (same).[28]

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27. Prior to admitting Juniper's attorney fee billing in evidence, the bankruptcy judge stated: "[A]ssuming only for the moment that legal services are a compensable item of damage [under CERCLA], then aren't all reasonable fees incurred by the plaintiff resulting from the alleged harm, aren't they all compensable? . . . [D]idn't [Juniper's attorneys] perform services as a result of the acts of the defendant if I find the defendant liable?" Thus, the court plainly signaled its intention to treat Juniper's entire attorney fee request as either compensable or noncompensable.

28. Even assuming the issue was preserved, the record on appeal does not enable reliable appellate review. It is impossible to determine with reasonable confidence whether the attorney fees incurred by Juniper were reasonably "necessary" to facilitate its compliance with the EPA administrative order, or to discover the existence or whereabouts of other PRPs who might be amenable to suit by Juniper in an action for contribution.

C. The Trustee's Cross-Appeal: Administrative Expense Priority for Past Response Costs.

The trustee appeals the allowance of Juniper's claim for past response costs as an administrative expense entitled to priority distribution. The bankruptcy court ruled that Juniper's CERCLA liability resulted from its postpetition purchase of the facility from Hemingway-Bristol, debtor in possession, during the course of the chapter 11 proceeding. The bankruptcy court found that it would be fundamentally "unfair" not to allow Juniper to receive payment of its contribution claim in advance of other creditors. *See supra* note 17 (noting court's reliance on *Reading Co. v. Brown*, 391 U.S. 471 (1968)).

We affirm the allowance of Juniper's claim for past response costs as an administrative expense entitled to priority distribution under Bankruptcy Code §§ 503(b)(1)(A), 507(a)(1) and 726(a)(1). *See Norris v. Lumbermen's Mut. Cas. Co.*, 881 F.2d 1144, 1151-52 (1st Cir. 1989) (appellate court may affirm on any ground supported by the record). As concerns Juniper's claim for CERCLA response costs previously incurred, its entitlement to priority does not hinge on the court's determination of the merits of Juniper's "innocent landowner" defense. Even if Juniper and the Hemingway-Bristol estate are co-"liable" on the EPA debt, Juniper's claim for past response costs escapes the section 502(e)(1)(B) coliability problem encountered by its claim for future response costs, because Juniper's right to payment for past response costs became "fixed" upon Juniper's incurrence of actual and necessary response costs prior to the time its claim was considered for allowance. On the other hand, if Juniper and the estate are not co-"liable" on the EPA debt, because Juniper has the benefit of the "innocent landowner" defense, both its past and future response costs are recoverable as priority administrative expenses under either *Mammoth Mart* or *Reading*.

Appendix A

III

CONCLUSION

We vacate the bankruptcy court's section 502(e)(1)(B) disallowance of Juniper's claim for future response costs. On remand, the bankruptcy court shall permit the chapter 7 trustee and Juniper a reasonable time within which to file surrogate claims in behalf of the EPA under sections 501(b) or 501(c) of the Bankruptcy Code. Should the trustee file a timely surrogate claim, and should Juniper choose to press for simultaneous allowance of its so-called "direct" claim, the court should determine whether Juniper would be entitled to an "innocent landowner" defense pursuant to 42 U.S.C. § 9601(35)(B). If Juniper is so entitled, its claim for "contribution" should be allowed as an administrative expense. If not so entitled, its claim should be disallowed unless and until Juniper "fixes" its right to contribution by actually incurring any such response costs by the time its claim is considered for allowance. If the chapter 7 trustee elects not to file a surrogate claim under section 501(b), thereby waiving the section 502(e)(1) (B) objection to Juniper's direct claim against the chapter 7 estate, the court should receive evidence relating to the extent of Juniper's anticipated response costs and should allow Juniper's claim as an administrative expense of the chapter 11 estate.

The order disallowing an award of attorney fees, and the order allowing Juniper's claim for past response costs as an administrative expense, are affirmed. The order disallowing Juniper's claim for future response costs is vacated and remanded to the bankruptcy court for further proceedings consistent with the opinion herein; costs to neither party.

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APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED MARCH 26, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NOS.
90-10302-Z, 90-10431-Z and
90-10432-Z, Consolidated

In re HEMINGWAY TRANSPORT, INC. and BRISTOL TERMINALS, INC.,

Debtors

* * *

JUNIPER DEVELOPMENT GROUP, a Massachusetts Partnership; and GEORGE D. WHITTEN, AMY WHITTEN and CHARLES WHITTEN, as Trustees of 60 OLYMPIA NOMINEE TRUST,

Appellants and Cross-Appellees

vs.

HERBERT C. KAHN, Trustee for HEMINGWAY TRANSPORT, INC. and BRISTOL TERMINALS, INC.,

Appellee and Cross-Appellant

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MEMORANDUM OF DECISION

ZOBEL, D.J.

This consolidated bankruptcy appeal presents several issues of law arising out of three different decisions of the Bankruptcy Court. *See In re Hemingway Transport, Inc.*, 108 Bankr. 378 (D. Mass. 1989); 105 Bankr. 171 (D. Mass. 1989); 73 Bankr. 494 (D. Mass. 1987). Briefly, the underlying facts are these: On July 28, 1982, the Debtors, Hemingway Transport, Inc. and Bristol Terminals, Inc. (collectively, "Hemingway"), filed voluntary petitions for bankruptcy under Chapter 11 of the Bankruptcy Code. (The proceedings subsequently were converted to Chapter 7 on November 18, 1983.) While in Chapter 11, the Debtors, with Court approval, sold a parcel of real property located at 60 Olympia Avenue, Woburn, Massachusetts ("the Property") to Juniper Development Group.

In April, 1985, a representative of the Environmental Protection Agency ("EPA") discovered a number of barrels containing hazardous waste on the Property. The EPA then issued an order pursuant to section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9606(a) (1988), directing Juniper to remove the drums and surrounding soil. Juniper complied with the order. In 1986, Juniper commenced the instant adversary proceeding in which it seeks indemnification or contribution under CERCLA for past and future "response costs" incurred as a result of compliance with the EPA order. Two years later, on April 20, 1988, the EPA notified Juniper of its status as a "Potentially Responsible Party" in connection with the so-called Wells G & H Superfund Site, a 330-acre parcel of land which includes the Property now owned by Juniper.

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Three separate decisions of the Bankruptcy Court are at issue. First, on May 8, 1987, the Bankruptcy Court, on a motion for summary judgment, held that Juniper's claims for response costs were entitled to administrative expense priority under the Bankruptcy Code. Hemingway appeals from this decision. Second, Juniper appeals from a decision, dated September 13, 1989, which (on another motion for summary judgment) disallowed, as contingent claims for reimbursement or contribution under § 502(e)(1)(B) of the Bankruptcy Code, Juniper's claims for future response costs. Third, in a decision dated December 18, 1989 (following an evidentiary hearing on October 17), the Bankruptcy Court held that neither attorney's fees nor prejudgment interest were recoverable as response costs under CERCLA. At the October 17 hearing, the Bankruptcy Court also excluded evidence concerning certain labor expenses which Juniper claimed as recoverable response costs; Juniper appeals this ruling as well.

Standards of Review

The opinions of the Bankruptcy Court, dated May 8, 1987 and September 13, 1989, both resolved motions for summary judgment. A district court, sitting in review, considers a bankruptcy court's decision to grant summary judgment *de novo*. *In re Two "S" Corp.*, 875 F.2d 240, 242 (9th Cir. 1989). The standard for granting summary judgment in an adversarial bankruptcy proceeding is the same as in Rule 56(c), Federal Rules of Civil Procedure. Bankruptcy Rule 7056, 11 U.S.C. (1988). Summary judgment is appropriate if, viewing the evidence in the light most favorable to the party opposing the motion, the court finds that there is no genuine issue of material fact. Fed. R. Civ. P. 56(c); *see also General Office Prods. Corp. v. A. M. Capen's Sons*, 780 F.2d 1077, 1078 (lst Cir. 1986).

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The appeals arising out of the October 17 evidentiary hearing and the resulting opinion are governed by a different standard. Bankruptcy Rule 8013 mandates the application of the "clearly erroneous" standard of review with regard to findings of fact made by the Bankruptcy Court, and "de novo" standard with respect to conclusions of law. *First Software Corp. v. Computer Assocs. Int'l*, 107 Bankr. 417, 420 (D. Mass. 1989). The issues presented in the instant appeal are questions of law.

Administrative Expenses

In enacting the Bankruptcy Code, Congress recognized that, if a business that has filed for bankruptcy is to continue operating for even a limited period of time, third parties must be willing to provide necessary goods and services. Since these parties will obviously not be so willing unless they are assured of payment ahead of pre-bankruptcy creditors, Congress provided a priority for administrative expenses, that is, "the actual, necessary costs and expenses of preserving the estate. . . ." 11 U.S.C. § 503(b)(1)(A) (1988).

The Bankruptcy Court undertook an extensive analysis of the relevant case law before reaching its conclusion that Juniper's claims are properly classified as administrative expenses. The Court relied primarily on a Supreme Court case, *Reading Co. v. Brown*, 391 U.S. 471 (1968), and on a First Circuit opinion, *In re Charlesbank Laundry*, 755 F.2d 200 (lst Cir. 1985).

In *Reading*, a fire caused by the negligence of a receiver acting within the scope of his employment destroyed property in adjoining premises. Fire loss claimants filed claims for administrative expenses. The Supreme Court held that "tort claims arising during a [Chapter 11 reorganization are] actual and

necessary expenses of the [reorganization]." *Reading*, 391 U.S. at 482. The Court found that the "decisive statutory objective" was "fairness to all persons having claims against an insolvent." *Id.* at 477. Unlike creditors who chose to do business with the debtor prior to its petitioning for bankruptcy, the fire victims "did not merely suffer injury at the hands of an insolvent business: [they had] an insolvent business thrust upon [them] by operation of law." *Id.* at 478.

More than ten years after *Reading*, the First Circuit in *Charlesbank* held that a civil compensatory fine for a violation of a state court injunction imposed on the debtor, when that debtor was operating under Chapter 11, qualified for priority treatment as an administrative expense. *Charlesbank*, 755 F.2d at 202-03. The court noted:

> The debtor in this case deliberately continued a violation of law month after month presumably because it was more lucrative for the business to operate outside the zoning ordinance than within it. If fairness dictates that a tort claim based on negligence should be paid ahead of pre-organization claims, then, *a fortiori*, an intentional act which violates the law and damages others should be so treated.

Id. at 202.

The reasoning in *Reading* and *Charlesbank* logically compel the conclusion that Juniper's claims must be granted administrative expense priority. As the court below reasoned, "clearly, if damages leading to a negligence claim against a receiver qualify as administrative expenses then so do damages

giving rise to a strict liability claim against a Chapter 11 debtor-in-possession under CERCLA." *Hemingway*, 73 Bankr. at 505.

Hemingway takes issue with this analysis in several, related ways. First, it argues, Juniper's remedial efforts cannot be construed as "preserving the estate" of the debtor within the meaning of § 503(b)(1)(A), since the property had been sold and transferred to Juniper three years before the EPA issued its cleanup order. But while the costs themselves may not have materialized until years later, Hemingway's liability arose from acts and omissions that were a part of its business operations. The eventual cleanup order came about because Hemingway improperly disposed of waste on its property, and later failed to remove these drums. In addition, the sale of the Property to Juniper, out of which Hemingway's liability eventually arose, was an attempt to raise money in order to continue business operations. That the drums were only discovered by the authorities years later does not alter the fact that their presence was a result of Hemingway's post-petition business operations. Moreover, all response cost claims under CERCLA involve some delay between the acts or omissions giving rise to liability, and the eventual cleanup order; to hold, as urged by Hemingway, would necessarily deprive all such claims of the benefit of administrative expense priority. CERCLA claims would thus receive far less favorable treatment in the bankruptcy context than do more conventional torts, a conclusion at odds with the broad remedial purposes of CERCLA, *Dedham Water Co. v. Cumberland Farms Dairy*, 805 F.2d 1074, 1081 (lst Cir. 1986), and the Supreme Court's emphasis on using the administrative expense priority system to achieve a fair result, *Reading*, 391 U.S. at 477.

Next, Hemingway contends that the Bankruptcy Court misapplied *Reading* and *Charlesbank* to these facts. Hemingway first points out that both of those cases involved debtors in Chapter

11 proceedings (where the debtor is charged with the continued operation of the insolvent business entity), rather than Chapter 7 liquidation proceedings. Chapter 7, however, also mandates that administrative expenses be given priority, *see* 11 U.S.C. § 726 (1988). Moreover, neither the Bankruptcy Code nor any court has drawn a distinction between Chapter 11 and Chapter 7 in determining administrative priority. *See In re Pierce Coal & Constr.*, 65 Bankr. 521 (N.D. W. Va. 1986) (any damages caused by debtor-in-possession under Chapter 11 *or* Chapter 7 trustee are entitled to administrative priority). Hemingway has failed to provide this Court with any authority mandating a difference in analysis, or with a compelling rationale for creating one.

Hemingway also argues that, since Juniper entered into the contract of sale with Hemingway "voluntarily and as a result of arms-length negotiations," it cannot be maintained that either Hemingway or the property were "thrust upon [Juniper] by operation of law." *Cf. Reading*, 391 U.S. at 478. It is wrong to conclude, however, that since Juniper's response costs were the result of its knowing acquisition of property, Juniper must now meet these cleanup obligations without help. Such a position contradicts one of CERCLA's basic goals, that is, the redistribution of response costs to previous owners of property who engaged in improper waste disposal. Rather, the EPA order placed an unexpected burden on Juniper for which it was legally entitled to contribution; if Juniper is now deprived of this contribution, its burden will have been increased by operation of the bankruptcy law. This is exactly the sort of unfair situation which led the Court in *Reading* to characterize the claims of tort victims as administrative expenses.

Finally, Hemingway asserts that the First Circuit, in *In re Mammoth Mart*, 536 F.2d 950 (lst Cir. 1976), endorsed a two-part

inquiry for determining administrative priority, and that Juniper has failed to meet that test. In *Mammoth Mart*, former employees of a bankrupt corporation operating under Chapter 11 contended that their claims for severance pay were entitled to administrative priority. The court held that claims against a debtor-in-possession are not entitled to such priority unless the debt arises "from a transaction with the debtor-in-possession" and the bankrupt estate gained benefit from that transaction, *id.* at 954. Hemingway contends that Juniper's claim neither arose from a transaction with the trustee, nor did Hemingway gain any benefit from any such transaction.

The court in *Mammoth Mart* was faced with the prospect of giving administrative priority to claims arising in large part from pre-petition activities. That is, the employees bringing the suit had been hired before the estate entered Chapter 11, and now claimed that their claim to severance pay was purely a post-petition expense. To avoid that result, the First Circuit fashioned a test designed to limit administrative priority to those claims arising only from post-petition activity.

It is clear in the case at bar that Hemingway's liability to Juniper arose post-petition. As the court below succinctly put it, "Juniper's cause of action under CERCLA arose when the property containing the drums was transferred to Juniper or, alternatively, when Juniper expended money in response to the EPA's administrative order." *Hemingway,* 73 Bankr. at 503. Hemingway therefore must rely on a semantic argument that misses the essence of what the court in *Mammoth Mart* was trying to do. Hemingway claims that, since Juniper's claims do not arise entirely from the sale of property alone, they do not arise from a "transaction" and thus cannot be accorded administrative priority under *Mammoth Mart.*

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Hemingway and Juniper were engaged in a post-petition commercial relationship which promised to benefit both parties. Juniper's liability would obviously never have existed were it not for this relationship. Its claim clearly arises out of a post-petition transaction within the meaning of *Mammoth Mart*. To hold otherwise would, once again, prevent classification of any CERCLA response cost claim as an administrative expense, because no such claim arises solely from a single "transaction."

Disallowance under § 502(e)(1)(B)

Juniper contends that the court below erred in disallowing its claims for future response costs under § 502(e)(1)(B) of the Bankruptcy Code.[1] For a claim to come within this provision, (i) it must be one for reimbursement or contribution; (ii) the entity asserting the claim must be "liable with the debtor" on or have secured the claim of a creditor; and (iii) the claim must be contingent at the time of its allowance or disallowance. 11 U.S.C. § 502(e)(1)(B) (1988); *In re Wedtech Corp.*, 85 Bankr. 285, 289 (S.D.N.Y. 1988). The court below held that Juniper's claim against Hemingway satisfied all three prongs. *Hemingway*, 105 Bankr. at 174-78. Juniper argues that neither the second nor third requirements are met.

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1. Appellee argues that appellant Juniper, in its opposition to the motion below, failed to address the impact of § 502(e)(1)(B) on its claim against Hemingway; therefore, appellee argues, Juniper is not entitled to raise any objections to the application of that statute on appeal. The applicability of § 502(e)(1)(B) was, however, the subject of the Memorandum of Decision which Juniper now appeals. *Hemingway*, 105 Bankr. at 171. Because Juniper raises objections to matters considered below, it is obviously within this Court's discretion to entertain these arguments now.

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1. Co-liability

Juniper's first argument, simply put, is that § 502(e)(1)(B) must be read literally and applied narrowly. Appellant contends that Hemingway and Juniper are not both liable on the claim of the EPA, since the EPA has not yet filed a proof of claim against Hemingway.[2] Because the statute reads, "is liable" instead of "could be" liable "on the claim of a creditor," appellant argues, its claim should not be disallowed.

In support of its interpretation of the statute, appellants assert that the purpose of § 502(e)(1)(B), as illuminated by legislative history, is the prevention of a double payment by the debtor (here, Hemingway) on the same debt. Where there has not been a claim against the debtor by the creditor (the EPA), the argument goes, the debtor is not subjected to a dual claim, and there is no need to protect the debtor by disallowing the codebtor's claim under § 502(e)(1)(B).

It is true that "the legislative history concerning § 502(e) indicates that a principal purpose of the entire subsection is to prevent a double payment by the estate." *Wedtech*, 85 Bankr. at 289; *see* H.R. Rep. No. 595, 95th Cong., 1st Sess. 354 (1977). Nevertheless, the plain language of § 502(e)(1)(B) suggests that this particular provision also serves a different purpose: to disallow contingent indemnity and contribution claims precisely because they are contingent, thereby "enabling distribution to unsecured creditors without a reserve for these types of contingent

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2. Appellee points out that this argument relies on facts not presented to the court below, namely, that the EPA has not filed a proof of claim against Hemingway. Whether or not this fact may be considered on appeal, however, is of no consequence, as I hold here that the EPA is indeed a creditor of Hemingway within the meaning of § 502(e)(1)(B).

claims." *Wedtech,* 85 Bankr. at 290; *see also In re Amatex Corp.*, 110 Bankr. 168, 170-72 (E.D. Pa. 1990). Juniper's interpretation of the statute would require both the debtor and the co-debtor (here, Juniper) to have been adjudged liable before the codebtor's claim could be disallowed under § 502(e)(1)(B). This interpretation simply does not comport with the wording of the statute.

Under CERCLA, Hemingway is potentially liable to the EPA for "all costs of removal or remedial action incurred by the United States Government. . . . not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(2)(A) (1988). Indeed, the EPA has named both Juniper and Hemingway as potentially responsible parties. The EPA is therefore a creditor of Hemingway within the meaning of § 502(e)(1)(B), even assuming it has not yet filed a proof of claim against Hemingway.

2. Contingency of the Claim

Juniper also claims that § 502(e)(1)(B) is not applicable here because its claim against Hemingway for future response costs is not "contingent" within the meaning of that statute. The court below was unconvinced by Juniper's argument:

> [T]he contingency of Juniper's claim for future response costs is obvious. With respect to obligations stemming from the administrative order, Juniper states in its complaint that it is awaiting "further orders for a possible future clean up. . . ." With respect to costs of remediating the Wells G & H Site, any claim that Juniper would have would be contingent upon the United States commencing and prevailing in an enforcement action under

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> CERCLA or Juniper's involvement in performing or financing cleanup work at the cite.

Hemingway, 105 Bankr. at 178.

Under § 502(e)(1)(B), the claim of a surety or co-debtor is contingent until the claimant "pays the principal creditor and thereby fixes his own right to payment from the debtor." 3 *Collier on Bankruptcy* ¶ 502.05, at 502-88 (15th ed. 1990). Obviously, Juniper has not yet incurred any future response costs; nor has it been adjudged liable in an appropriate CERCLA enforcement action. Therefore, Juniper cannot yet be said to have fixed its own right of payment against Hemingway. Although Juniper has been named by the EPA as a "Potentially Responsible Party," this type of agency notice letter is not definitive on the question of liability. *Pacific Resins & Chems. v. United States*, 654 F. Supp. 249 (W.D. Wash. 1986). Juniper's claim against Hemingway for future response costs is therefore contingent within the meaning of § 502(e)(1)(B).

Accordingly, the decision of the court below with respect to the disallowance of Juniper's claim under § 502(e)(1)(B) is affirmed.

Response Costs

Appellant Juniper next appeals the bankruptcy court's ruling on December 18, 1989, that attorney's fees, prejudgment interest and other costs are not recoverable as response costs in a private party action under § 107(a)(2)(B) of CERCLA, 42 U.S.C. § 9607(a)(2)(B) (1988).

Since CERCLA does not define "response costs,"[3] the issue is one of statutory interpretation.

1. Attorney's Fees

The courts that have addressed the question of whether attorney's fees are necessary response costs under CERCLA have not reached consensus. *See, e.g., General Elec. Co. v. Litton Industrial Automation Systems*, No. 89-2845 (8th Cir. Dec. 12, 1990) (private party can recover attorney's fees under CERCLA); *Pease & Curren Ref., Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945 (C.D. Cal. 1990) (same); *Shapiro v. Alexanderson*, 741 F. Supp. 472 (S.D.N.Y. 1990) (attorney's fees recoverable for proper response activities); *cf. Fallowfield v. Strunk*, No. 89 Civ. 8644 (E.D. Pa. Apr. 23, 1990) (attorney's fees not recoverable); *Mesiti v.*

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3. While it does not precisely define the phrase "necessary response costs," CERCLA does provide that "response" means "remove, removal, remedy and remedial action . . . includ[ing] enforcement activities related thereto." 42 U.S.C. § 9601(25) (1988). "Remove" and "removal" are defined as:

> [T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

42 U.S.C. § 9601(23) (1988) (footnote omitted).

Microdot, 739 F. Supp. 57 (D.N.H. 1990) (same); *T & E Indus. v. Safety Light Corp.*, 680 F. Supp. 696 (D.N.J. 1988) (same).

A careful review of the statute persuades me that the costs of litigation are not recoverable by a private litigant. I start with the general principle that "[A]bsent explicit Congressional authorization, attorneys' fees are not a recoverable cost of litigation." *Runyon v. McCrary*, 427 U.S. 160, 185 (1976). CERCLA provides no such explicit authorization. The statute elsewhere specifically provides that the *government* can recover legal costs, 42 U.S.C. § 9604(b) (1988), but fails to extend that right to private parties. Nor can private litigation expenses be considered recoverable "enforcement activity" within the meaning of the statute; while "plaintiffs may bring an action for recovery of response costs, they may not bring an action to enforce CERCLA's cleanup provisions against another private entity." *T & E*, 680 F. Supp. at 708 n.13. Accordingly, plaintiffs are not entitled to recover attorney's fees that were incurred to pursue this litigation. *See also Regan v. Cherry Corp.*, 706 F. Supp. 145, 149 (D.R.I. 1989) (discussing Congress' failure to amend § 9607 to allow reimbursement of attorneys' fees in response cost suits).

2. Labor Costs

Juniper next argues that the Bankruptcy Court improperly excluded the value of the time of Juniper's personnel from its determination of recoverable response costs. Specifically, it suggests that the cost to Juniper of the time and effort spent on the problem by Mr. Charles Whitton, General Partner of Juniper, should have been part of the award.

Nothing in the statutory language of CERCLA indicates that employee time should be considered a cost of response. Rather,

employees must be paid whether or not they have spent their time addressing waste cleanup efforts; these costs are not made necessary by the improper disposal of wastes. To interpret CERCLA to require reimbursement of employee time and effort would, in effect, compensate CERCLA plaintiffs for lost employee productivity. But CERCLA was never intended to provide for the recovery of business losses. *Artesian Water Co. v. Gov't of New Castle County,* 659 F. Supp. 1269, 1287 (D. Del. 1987).

At the evidentiary hearing on October 17, the bankruptcy judge excluded testimony by Mr. Whitton regarding the value of his own efforts to address the waste problem. Because time spent on cleanup efforts is nothing more than a cost of doing business, I affirm that ruling. *But see T & E,* 680 F. Supp. at 706-07 (employee time spent in cleanup effort recoverable as response cost).

3. Prejudgment Interest

The Bankruptcy Court did not include prejudgment interest in its determination of Juniper's recoverable response costs in its decision of December 18, 1989. *Hemingway,* 108 Bankr. at 383-84. Once again, defendant objects to the omission, and once again, CERCLA does not specifically address the issue.

In the absence of legislative provision, the Supreme Court has directed that the decision to grant or deny prejudgment interest should hinge on whether to do so would further the congressional purposes underlying the obligations imposed by the statute in question. *Rodgers v. United States,* 332 U.S. 371, 373 (1947). CERCLA has been described as "a remedial statute designed by Congress to protect and preserve public health and the environment. . . . [I]ts provisions [should therefore be] construed liberally to avoid frustration of the beneficial legislative

purposes." *Dedham*, 805 F.2d at 1081. At least two district courts have imposed prejudgment interest under CERCLA in private party suits. *General Elec. Co. v. Litton Business Sys.*, 715 F. Supp. 949, 959 (W.D. Mo. 1989); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 852 (W.D. Mo. 1984). It is clear, then, that prejudgment interest is available under CERCLA.

In general, without statutory direction, the granting of prejudgment interest lies within the discretion of the trial court. *Whitfield v. Lindemann*, 853 F.2d 1298, 1306 (5th Cir. 1988). Such interest should be "given in response to considerations of fairness." *Blau v. Lehrman*, 368 U.S. 403, 414 (1962). The fact that the bankruptcy court declined without comment to award prejudgment interest makes it difficult to weigh the propriety of the exercise of discretion in this case. *Whitfield*, 853 F.2d at 1306. This issue, therefore, is remanded to the bankruptcy court to consider the matter of prejudgment interest.

Conclusion

For the reasons stated, the decision of the court below granting administrative expense priority to Juniper's claims is affirmed, as is its decision to disallow Juniper's claims for future response costs under 11 U.S.C. § 502(e)(1)(B). The decisions not to award attorney's fees to Juniper and to exclude evidence of Juniper's labor costs from its calculation of recoverable response costs are also affirmed.

The case is remanded to the Bankruptcy Court to consider whether prejudgment interest on the award to Juniper is appropriate, and if so, to determine the proper amount of that interest.

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March 26, 1991
DATE

s/ Ryan Zobel
DISTRICT JUDGE

APPENDIX C — OPINION OF THE UNITED STATES BANKRUPTCY COURT DISTRICT OF MASSACHUSETTS DATED DECEMBER 18, 1989

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

Chapter 7
Case No. 82-1340-JNG
Case No. 82-1341-JNG

Adversary Proceeding
86-1081

In re:

HEMINGWAY TRANSPORT, INC.
BRISTOL TERMINALS, INC.
Debtors

JUNIPER DEVELOPMENT GROUP, A MASSACHUSETTS PARTNERSHIP AND GEORGE D. WHITTEN, AMY WHITTEN, AND CHARLES WHITTEN AS TRUSTEES OF 60 OLYMPIA NOMINEE TRUST,

Plaintiffs

v.

HERBERT C. KAHN, TRUSTEE FOR HEMINGWAY TRANSPORT, INC., AND BRISTOL TERMINALS, INC.,

Defendants

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HERBERT C. KAHN, TRUSTEE FOR HEMINGWAY TRANSPORT, INC. AND BRISTOL TERMINALS, INC.,

Third-Party Plaintiffs

v.

WOBURN ASSOCIATES,

Third-Party Defendant

MEMORANDUM

I. FACTS

On October 17, 1989, this Court conducted an evidentiary hearing with respect to the CERCLA claim of Juniper Development Group ("Juniper") against the Trustee of Hemingway Transport, Inc. ("Hemingway") and Bristol Terminals, Inc. ("Bristol") (collectively "Hemingway"). Three witnesses testified during the hearing and nine exhibits were introduced into evidence. The parties[1] stipulated to the following relevant facts:

> 1. Juniper, Hemingway, Bristol and Woburn are "persons," as that term is defined by CERCLA. *See* 42 U.S.C.A. § 9601(21) (West 1983 & Supp. 1989).

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1 Third-party defendant Woburn Associates ("Woburn") joined the stipulation, and was permitted to participate at the trial without objection by Juniper.

2. Woburn was an "owner," as that term is defined by CERCLA, of 60 Olympia Avenue ("the property") from June 26, 1974 to July 29, 1980. *Id.* at § 9601(20).

3. Hemingway leased the property from Woburn from June 26, 1974 to July 29, 1980.

4. Bristol, a subsidiary of Hemingway, was the "owner," as that term is defined by CERCLA, of the property from July 29, 1980 to May 18, 1983.

5. Juniper purchased the property from Bristol on May 18, 1983 and has been an "owner," as that term is defined by CERCLA, since that date.

6. To the extent that it is found that "hazardous substances" were "disposed of," as those terms are defined in CERCLA, on the property at the time Hemingway, Bristol and Woburn owned and/or operated the property then the property is a "facility," as that term is defined in CERCLA. *Id.* at § 9601(9).

7. To the extent that Juniper successfully establishes all of the other elements of Section 107(a)(4)(B) of CERCLA, the parties stipulate that all of the costs Juniper incurred relative to the services performed by Clean Harbors, Inc. and Geotechnical Engineers, Inc. were a) $30,208.02; b) as a result of a release or

threatened release of hazardous substances; c) necessary; and d) consistent with the National Contingency Plan. *Id.* at § 9607(a).

George D. Whitten ("Whitten"), a general partner in Juniper Development Group was the first witness. He outlined the chronology of events that led to Juniper's acquisition of the 60 Olympia Avenue property. He also described the 21.4 acre parcel.

Whitten indicated that the property is composed of two lots. Lot 1 contains the truck terminal and associated industrial structures and is enclosed by a fence. This 6.6 acre rectangular parcel is located at the northeast corner of the property and is bordered by Olympia Avenue and the Aberjona River on the north and west sides, respectively. Lot 2, which contains approximately 13.8 acres of predominantly wetland, is "T"-shaped and bordered on the west side by MBTA railroad tracks. At the southwest corner of Lot 1, the Aberjona River, which separates the two lots and flows virtually due south to that point, assumes a serpentine configuration and flows in a southeasterly direction. Whitten testified that the barrels of toxic waste were found on Lot 2 at the juncture of the southern arm of the "T" and its base, approximately 100 yards from the railroad tracks and on the west side of the river. Whitten indicted that access to the location where the barrels were found from the terminal itself is virtually impossible because of the fence, the river and the swampy condition of the land. However, easy access to the location of the barrels is possible along the City of Woburn's sewer easement, which parallels the MBTA tracks. The location of the barrels strongly suggests to this Court, although the Court does not so find, that they did not emanate from the terminal facility, and, indeed, no allegation has ever been made that Hemingway was responsible for generating the toxic wastes in the barrels or for depositing them on the Olympia Avenue property.

Whitten testified that he first became aware of the barrels when he was contacted by a representative of the United States Environmental Protection Agency ("EPA"). He indicated that he climbed over a culvert and walked along the MBTA tracks to find the 55-gallon drums. Subsequently, the EPA, on December 30, 1985, sent Juniper a "Notification of Potential Liability Under Section 104 of CERCLA," which was followed, on or around February 6, 1986, by an Administrative Order. The order contains findings of fact and conclusions of law. Specifically, the order contains conclusions of law with respect to the presence, in the drums and soil, of "hazardous substances," as that term is defined in CERCLA, 42 U.S.C.A. § 9601(14), and the presence of an actual or threatened "release," *see Id.* § 9601(22), of those substances due to the past, present and potential migration of them at the site.[2]

Whitten testified that after receiving the Administrative Order, Juniper hired Clean Harbors, Inc. and Geotechnical Engineers, Inc. to perform cleanup activities. Juniper also hired Goldberg, Zoino & Associates ("GZA").

William Cashins ("Cashins"), an employee of the Division of Water Pollution Control, Massachusetts Environmental Protection

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2 Specifically, the following substances were found in the soil: 1,1-Dichloroethane (11 parts per million (ppm)); 1,1,1Trichloroethane (49 ppm); Trichloroethylene (390 ppm); Tetrachloroethylene (32 ppm); Toluenes (4.1 ppm); Xylenes (6.9 ppm); Chlordane (51,000 ppm); PCB AROCLOR (31,000 ppm). The following substances were found in the drums (1,1,1-Trichloroethane (3ppm); Tetrachloroethylene (74(ppm); and Xylenes (6.1 ppm). According to the Administrative Order, Trichloroethylene, tetrachloroethylene, 1,1,1-dichloroethane, 1,1,1 trichloroethane, toluene and xylene will volatilize into the air or migrate from the soil into the ground water. Chlordane and PCB's are persistent and stable in the environment.

Agency, was the second witness. (The Massachusetts Environmental Protection Agency was until recently known as the Department of Environmental Quality Engineering ("DEQE")). He indicated that on August 15, 1980, he discovered 17 barrels of waste on the Olympia Avenue property while responding to a complaint made by a local cable TV company about barrels on or near the MBTA tracks. Cashins indicated that the barrels were rusted and that about one-half of them were overturned. Cashins observed, in his words, a semi-solid, tar-like substance that had flowed from the barrels on to the ground. Cashins obtained a sample of the material and requested an analysis of it. A document was submitted into evidence indicating that the sample collected by Cashins was received by the DEQE's Lawrence Experimental Station for "oil analysis." The results of the tests conducted by lab personnel in June of 1981 revealed the following: "it appears that wide cut gas oil, which includes lubricating oil, is present in the sample."

Cashins also testified about his contacts with Hemingway personnel and subsequent visits to the property. Additionally, correspondence between the DEQE and Hemingway was introduced into evidence. The testimony and exhibits revealed that on or about October 10, 1980, Hemingway was informed that "old barrels with hazardous waste and rubbish" were on the property and should be removed by a licensed hazardous waste contractor. By letter dated November 10, 1980, Hemingway responded to the DEQE letter assuring the DEQE of its full cooperation. Cashins subsequently toured the property with Larry Hall, Hemingway's Terminal Manager, who indicated he would get estimates from licensed contractors about the cost of removing the barrels. However, on February 9, 1981 and on April 6, 1981, when Cashins checked the area, the barrels had not been removed. Following an inspection that took place on August 10, 1982, Cashins learned

from Hemingway's General Manager, Dave Butcher, that the company had filed a bankruptcy petition under Chapter 11.

The final witness was John J. Balco ("Balco") from Goldberg, Zoino & Associates. Mr. Balco's impressive credentials qualified him as an expert witness. He indicated that GZA prepared and modified a Project Operations and Investigation Plan for the Olympia Avenue site and monitored the clean-up. He testified that Juniper paid GZA $8,555.61 in conjunction with this work which was done pursuant to the Administrative Order and in a manner consistent with the National Contingency Plan. Balco also indicated that GZA was paid $1,967.60 for work done in 1989. That work consisted of reviewing the EPA's conclusions about the 60 Olympia Avenue property.

Balco testified that GZA was unable to determine precisely how and when ground water contamination occurred. However, he did indicate that certain of the toxic chemicals found in the barrels and soils could be entrained by rainwater, and that rainwater will percolate into the soil, resulting in contamination of the groundwater.

II. LIABILITY

Pursuant to CERCLA, Juniper, in order to prevail in its action against the Trustee for necessary response costs, must prove that the Trustee owned or operated the facility "at the time of disposal of any hazardous substance" 42 U.S.C.A. § 9607 (a)(2).

Since the parties have stipulated to the fact that there was a release or threatened release, assuming Juniper can establish the other elements of section 9607(a)(2)(B), and that the release caused Juniper to incur costs that were necessary and consistent

with the National Contingency Plan, the Trustee's liability to Juniper turns on whether Hemingway owned or operated the property "at the time of disposal" of "hazardous substances."

According to section 101(29) of CERCLA, disposal "shall have the meaning provided in section 1004 of the Solid Waste Disposal Act." *See* 42 U.S.C.A. § 6901 et seq. (West 1983 & Supp. 1989). Section 1004(3) of that Act provides that

> [the] term 'disposal' means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U. S. C. A. § 9603(3).

The United States District Court for the District of New Hampshire has noted "[the] definition of 'disposal' is quite broad. '[S]ignificantly, it includes within its purview leaking, which ordinarily occurs not through affirmative action but as a result of inaction or negligent past actions.' " *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1399 (D.N.H. 1985), *quoting United States v. Price*, 523 F.Supp. 1055, 1071 (D.N.J. 1981), *aff 'd*, 688 F.2d 204 (3d Cir. 1982). *See also Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988); *American Mining Congress v. United States Environmental Protection Agency*, 824 F.2d 1177, 1196 (D.C. Cir. 1987); *United States v. Waste Industries, Inc.*, 734 F.2d 159, 165 (4th Cir. 1984). The Fourth Circuit has determined that

> [the] inclusion of "leaking" as one of the diverse definitional components of "disposal" demonstrates that Congress intended "disposal" to have a range of meanings, including conduct, a physical state, and an occurrence. Discharging, dumping, and injection (conduct), hazardous waste reposing (a physical state) and movement of the waste after it has been placed in a state of repose (an occurrence) are all encompassed in the broad definition of disposal. "Leaking" ordinarily occurs when landfills are not constructed soundly or when drums and tank trucks filled with waste materials corrode, rust, or rot. Thus "leaking" is an occurrence included in the meaning of "disposal."

734 F. 2d at 164 . Likewise, the Fifth Circuit has observed that the "definition of disposal does not limit disposal to a one-time occurrence-there may be other disposals when hazardous materials are moved, dispersed, or released during landfill excavations and fillings." 849 F.2d at 1573. Judge Mikva, in an dissenting opinion in another circuit case, stated

> This definition clearly encompasses more than the everyday meaning of disposal, which is a "discarding or throwing away." *Webster's Third International Dictionary* 654 (2d ed. 1981). The definition is *functional:* waste is disposed under this provision if it is put into contact with land or water in such a way as to pose the risks to health and environment that animated Congress to pass RCRA.

824 F. 2d at 1196.

In view of the First Circuit's directive that "[s]tatutes such as CERCLA which were enacted for the protection and preservation of public health are to be given an extremely liberal construction for the accomplishment of their beneficial objectives," *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (lst Cir. 1986), the Court has no difficulty concluding that Hemingway was an owner of the property at the time of disposal, and that that time was co-extensive with the period of Hemingway's possession of the property both pre- and post-petition, as the drums, particularly those that were over turned and from which a tar-like substance was emerging, obviously were deteriorating and thus "leaking" due to their exposure to the elements over a period of years.

Section 101 of CERCLA defines "hazardous substance" as follows:

> The term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6912] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any

> hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

42 U.S.C.A. § 9601(14) (West 1983 & Supp. 1989). In view of the exclusion of petroleum and crude oil from the definition of hazardous substances, counsel to Woburn, argued that Juniper failed to prove that hazardous substances were present at the time Hemingway owned or leased the property. Since the Administrative Order of February 6, 1986 contains a finding that hazardous substances were located in the drums and on the ground, acceptance of Woburn's argument would leave the Court with no choice but to find that the barrels found by William Cashins in August 1980, which according to the DEQE contained wide cut gas oil, were removed by some unknown force or agent and replaced with similar barrels containing hazardous substances. The Court is unable to accept this preposterous conclusion. Clearly, the chemical analysis conducted by the DEQE was expressly limited to an oil analysis and did not preclude the findings made by the EPA after more extensive and sophisticated testing of samples from the barrels and soil. Admittedly, there was no direct testimony that the 17 barrels found by Cashins contained hazardous

substances in 1980. Nevertheless, the Court is compelled to conclude, since the barrels contained hazardous substances in 1986, that it is more likely than not that those substances were in the barrels in 1980 and leaked on to the ground, and that the hazardous substance on the ground were more likely than not to contaminate the soil and possibly the ground water due to their entrainment in rainwater.

II. ATTORNEYS' FEES

Juniper submitted as an exhibit copies of bills from its attorneys that it paid. Citing *General Electric Company v. Litton Business Systems, Inc.*, 715 F. Supp. 949 (W.D. Mo. 1989), it argues that attorneys' fees and prejudgment interest are recoverable as response costs. The Trustee disagrees, citing *inter alia State of Idaho v. Hanna Mining Co.*, 882 F.2d 392, 396 (9th Cir. 1989); *Regan v. Cherry Corp.*, 706 F. Supp. 145, 149 (D. R. I. 1989); and *T&E Industries, Inc. v. Safety Light Corp.*, 680 F.Supp. 696, 707 (D.N.J. 1988). The Trustee also notes that in the *General Electric* opinion the court failed to distinguish between government and private party actions in relying on its earlier opinion in *United States v. Northeastern Pharmaceutical and Chemical Co., Inc.*, 579 F.Supp. 823, 852 (W.D. Mo. 1984), in which attorneys' fees were awarded to the United States government.

This Court has reviewed the case law surrounding the issue of whether attorneys' fees are recoverable as response costs in private party actions and is compelled to agree with the Trustee. As the court in *Regan* stated:

> If Congress had intended to permit citizens seeking response costs to recover their attorney

> fees, it would simply have amended 107 to allow the recovery of these litigation costs. SARA was a comprehensive overhaul of CERCLA. Therefore, it would have been a simple matter to amend § 107 to allow recovery of attorney fees.

706 F. Supp. at 149. *See also T&E Industries, Inc.*, 680 F. Supp. at 707 ("[T]his court finds no indication that attorney fees and costs of litigation are recoverable by a private litigant.").

IV. CONCLUSION

In view of the fact that the Court has determined that the Trustee is liable to Juniper for response costs, excluding attorneys' fees, the remaining issue is whether the Trustee is responsible for those costs incurred by Juniper in addition to the $30,208.02 paid to Clean Harbors, Inc. and Geotechnical Engineers, Inc., namely the sums of $8,555.61 and $1,967.60 paid to GZA. The Court after careful review of the Administrative Order finds that the Trustee is liable for the former amount but not the latter. The Administrative Order expressly required the formulation of Project Operations and Investigation Plan, and Mr. Balco testified that the work done in preparing the plan and overseeing the work performed pursuant to the plan was consistent with the National Contingency Plan. However, the testimony relative to the $1,967.60 expenditure was vague. Therefore, the Court is unable to find that that expenditure was both necessary and consistent with the National Contingency Plan.

In accordance with the foregoing and the memorandum and arguments of counsel, the Court hereby enters judgment in favor of Juniper and against the Trustee in the amount of $38,763.63.

Appendix C

Consistent with this Court's memorandum and order of May 8, 1987, this sum shall be accorded an administrative priority. The entry of this order shall constitute a denial of the Trustee's motion to reconsider that order.

By the Court,

s/ James N. Gabriel
James N. Gabriel
Chief Judge

Dated: December 18, 1989

c.c. William Macauley, Esq., Louis N. Massery, Esq., Thomas Urmy, Jr., Esq.

APPENDIX D — OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MASSACHUSETTS DATED SEPTEMBER 13, 1989

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

Chapter 7
Case No. 82-1340-JNG
Case No. 82-1341-JNG

Adversary Proceeding
86-1081

In re:

HEMINGWAY TRANSPORT, INC.
BRISTOL TERMINALS, INC.
Debtors

JUNIPER DEVELOPMENT GROUP, A MASSACHUSETTS PARTNERSHIP AND GEORGE D. WHITTEN, AMY WHITTEN, AND CHARLES WHITTEN AS TRUSTEES OF 60 OLYMPIA NOMINEE TRUST,

Plaintiffs

v.

HERBERT C. KAHN, TRUSTEE FOR HEMINGWAY TRANSPORT, INC., AND BRISTOL TERMINALS, INC.,

Defendants

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HERBERT C. KAHN, TRUSTEE FOR HEMINGWAY TRANSPORT, INC. AND BRISTOL TERMINALS, INC.,

Third-Party Plaintiffs

v.

WOBURN ASSOCIATES,

Third-Party Defendant

MEMORANDUM

I. INTRODUCTION

On June 6, 1989, the Trustee filed a single pleading captioned "Motion for Reconsideration or, in the Alternative, Clarification of Administrative Expense Ruling, and Motion for Summary Judgment on Scope of Claim for Future Response Costs." The plaintiffs in this protracted adversary proceeding, Juniper Development Group and the trustees of the 60 Olympia Avenue Nominee Trust (collectively "Juniper"), filed an opposition to the Trustee's motions. The Court conducted a hearing on July 26, 1989. At the conclusion of the hearing, the Court took the Trustee's motions under advisement. The Trustee's Motion for Summary Judgment which involves the application of section 502(e)(1)(B) of the Bankruptcy Code to Juniper's claim for future response costs, is the subject of this memorandum, the fourth memorandum generated by this complex case that perforce involves the conflicting policies embodied in the Bankruptcy Code and the Comprehensive Environmental Response, Compensation and

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Liability Act of 1980 ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C.A. §§ 9601-9615 (West 1983 & Supp. 1989).[1]

II. BACKGROUND

Although the facts of this case have been outlined in other opinions, recently completed discovery and recent developments

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1. Commenting on CERCLA, and, parenthetically, the Bankruptcy Reform Act, Judge Young of the United States District Court for the District of Massachusetts has noted:

> Certain statutes stand out as models of the art of legislative draftsmanship. *See e.g.*, 18 U.S.C. § 361 (Supp. 1946), commended by Professor Alfred Conard in *New Ways to Write Laws*, 56 Yale L.J. 458 at 469, 478 (1947). Others, frequently those enacted in the "harried and hurried" atmosphere prevalent during the final days of a legislative session, *see Shine v. Shine*, 802 F.2d 583, 587 (lst Cir. 1986) commenting on the Bankruptcy Reform Act; *see also In re Mojica*, 30 B.R. 925, 930 (Bankr. E.D.N.Y. 1983) achieve a certain quirky notoriety precisely because they are so badly drafted as to be virtually incomprehensible. . . . Prominent among this latter group is CERCLA. . . . "CERCLA has acquired a well-deserved notoriety for vaguely drafted provisions and an indefinite, if not contradictory, legislative history." *Dedham Water Co. v. Cumberland Farms Dairy Inc.*, 805 F.2d 1074, 1080 (lst Cir. 1986), quoting *United States v. Mottolo*, 605 F. Supp. 898, 902 (D. N.H. 1985).

In re Acushnet River & New Bedford Harbor Proceedings, 675 F. Supp. 22, 25-26 n.2 (D. Mass. 1987).

in the case make a recitation of salient events advisable. No material facts are in dispute.

On July 28, 1982, the Debtors, Hemingway Transport, Inc. ("Hemingway") and Bristol Terminals, Inc. ("Bristol") filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code. The proceedings subsequently were converted to Chapter 7 on November 18, 1983. While in Chapter 11, however, the Debtors sought and obtained Court approval for the sale of real property, together with all structures and improvements, located at 60 Olympia Avenue, Woburn, Massachusetts to Juniper.[2]

In April 1985, almost two years after the consummation of the Court authorized sale, a representative of the Environmental Protection Agency ("EPA") discovered a number of barrels containing hazardous waste on the Olympia Avenue property. After performing tests on the contents of the drums and soil, the EPA, on February 7, 1986, issued an administrative order pursuant to section 106(a) of CERCLA. The order contained an administrative determination that the Olympia Avenue property was a "facility" as defined in section 101(9) of CERCLA, 42 U.S.C. § 9601(9); that the trustees of the 60 Olympia Avenue Nominee Trust were "persons and "owners as defined in sections 101(21) and (20), respectively, of CERCLA, 42 U.S.C. § 9601 (21), (20); that substances found in the soil and drums on the property were "hazardous substances" as defined by section 101(14) of CERCLA, 42 U.S.C. § 9601(14); that the past, present and potential migration of such hazardous substances constituted an "actual or threatened release" as defined by section 101(22) of

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2. The purchase and sale agreement identified Bristol as the seller and George D. Whitten, a general partner of Juniper as the buyer. 60 Olympia Avenue Trust is identified in the plaintiffs' amended complaint as a d/b/a of Juniper.

CERCLA, 42 U.S.C. § 9601(22); and that the trustees as present owners of the Olympia Avenue property were responsible parties pursuant to section 107 (a) of CERCLA, 42 U.S.C. § 9607 (a). The administrative order directed the trustees to remove the drums and surrounding soil. Juniper complied with the order and hired a contractor to remove the barrels and contaminated topsoil. Juniper alleges that it has expended over $60,000 in complying with the administrative order.

On May 7, 1986, Juniper commenced the instant adversary proceeding. Juniper sought indemnification or contribution for "response costs" incurred as a result of compliance with the administrative order, as well as any future costs associated with the cleanup. Juniper also sought relief under theories of fraud, equitable recision and breach of warranty. On September 8, 1986, the Trustee moved for summary judgment. The Court ruled in favor of the Trustee on all counts and causes of action directly related to the sale of the property. However, the Court denied the Trustee's motion with respect to Juniper's CERCLA claims and, indeed, allowed Juniper to amend its adversary complaint to include the statutory prerequisites set forth in section 107(a)(2)(B) of CERCLA. The Court also ruled that, if Juniper prevailed on its claim, response costs incurred by Juniper would be entitled to treatment as administrative expenses. Additionally, the Court indicated that it would schedule a hearing "for the purpose of establishing the exact amount of Juniper's response costs and estimating its future response costs. . . ." *See In re Hemingway Transport, Inc.*, 73 B.R. 494 (Bankr. D. Mass. 1987).

While the language utilized by the Court possibly may have suggested otherwise, the Court neither found that Hemingway was liable to Juniper nor precluded the Trustee from raising an objection to Juniper's claim for future response costs under section

502(e)(1)(B) of the Bankruptcy Code. A ruling in favor of the Trustee with respect to his pending section 502(e)(1)(B) summary judgment motion obviously would obviate the need for a hearing pursuant to section 502(c) to estimate Juniper's future response costs.

In May of 1987, Juniper filed its amended complaint. The amended complaint contains the following allegations: 1) that the Trustee knew or had reason to know that the Massachusetts Department of Environmental Quality Engineering ("DEQE") had issued an administrative order to the Debtors in 1982 or earlier requiring them to cleanup the Olympia Avenue property; 2) that the Debtors owned the property and/or operated a facility at the property at the time the barrels of hazardous waste were deposited; and 3) that the Debtors, as potentially responsible parties, are responsible for either all or part of the cleanup. Thus, through its complaint, Juniper requests the following:

> . . . complete indemnification from the defendant for all past and future costs incurred or assessed for said cleanup, and exercises its right of subrogation to the E.P.A. or the D.E.Q.E., against the defendant for all past and future costs incurred or assessed for said cleanup or in the alternative, requests contribution from the defendant on a pro-rata basis for all past and future costs incurred or assessed for said cleanup, plus interests, costs, and attorneys fees.

Parenthetically, Juniper's amended complaint is troublesome in two respects. In the first place, Juniper fails to specify whether it is proceeding under section 107(a) of CERCLA or under section

113(f)(1) of CERCLA or under both sections. Secondly, Juniper fails to allege that its response expenditures were consistent with the national contingency plan.

With respect to Juniper's allegation that the DEQE had informed the Debtors of the presence of toxic waste on the property, Juniper learned through a Freedom of Information Act request to the EPA that the barrels containing toxic waste were first discovered on the Olympia Avenue property on or around May 15, 1980 by William Cashins, a representative of the DEQE. Hemingway was informed of the discovery and responded to the DEQE by letter in November of 1980. Hemingway, however, failed to cleanup the property, despite repeated inspections by William Cashins in February and April of 1981.

About one year after the Court's summary judgment ruling, the EPA, by letter dated April 20, 1988, notified Juniper of it status as a potentially responsible party in connection with the so-called Wells G&H Superfund Site (the "Site"). The EPA demanded from Juniper payment of approximately $2.1 million, plus interest pursuant to section 107(a)(4)(D) of CERCLA. The Wells G&H Site is a 330-acre parcel of land that includes the 21.4 acres that comprise the Olympia Avenue property now owned by Juniper. According to the Trustee, wells G and H are municipal wells that were developed in the 1960's to supplement the water supply for the City of Woburn. In 1979, the Woburn police discovered over 180, 55-gallon drums abandoned on the Site, which is now included in the Superfund National Priorities List of hazardous waste sites and the focus of much media attention due to litigation involving an alleged link between the incidence of childhood leukemia and contamination of Woburn's water supply.

By letter dated February 3, 1989, the EPA, pursuant to section

107(a)(2) of CERCLA, informed the Trustee of Hemingway's potential liability as a former owner or operator of the site "at the time of disposal of any hazardous substances." Notably, the EPA made no demand for payment on the Trustee.[3]

III. DISCUSSION

The Trustee, through his motion for summary judgment, seeks the disallowance of Juniper's claim for future response costs under section 502(e)(1)(B) of the Bankruptcy Code because 1) Juniper's claim is one for reimbursement or contribution; 2) Juniper is liable with the Debtor on the claim; and 3) the claim is contingent upon future events.

A. Section 502(e)(1)(B)

Section 502(e)(1)(B) of the Bankruptcy Code provides in relevant part:

> . . . the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on . . . the claim of a creditor, to the extent that such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution.
> . . .

11 U.S.C. § 502(e)(1)(B).

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3. Third-party defendant, Woburn Associates was also notified of its potential liability as a former owner of the property by letter dated February 3, 1989.

Appendix D

In the Court's order of May 8, 1987, the Court referred to section 502(c) of the Bankruptcy Code. That section provides in relevant part: "there shall be estimated for purpose of allowance under this section — (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case maybe, would unduly delay the administration of the case." 11 U.S.C. § 502(c). *Collier* explains the relationship between section 502(c) and section 502(e)(1)(B) of the Bankruptcy Code as follows:

> While section 502(e)(1)(B), facially, would seem at war with section 502(c) dealing with estimation for purpose of allowance of contingent claims, it must be viewed from the standpoint of the surety or person secondarily liable with which it deals rather than from the standpoint of the debtor's creditor with which section 502(c) obviously deals. The two entities are vastly different and their legal imports in the context of the bankruptcy statute are vastly different. To be sure, section 502(a) provides that a claim which is filed under section 501 is deemed allowed. Thus, for purposes of section 502(e)(1)(B), the filing must be considered "the time of allowance or disallowance of such claim." If objection to the surety's claim is made on section 502(e)(1) grounds, then the time of allowance will be postponed until the hearing and ruling on the objection. Section 502(c), as already seen, mandates estimation for purpose of allowance of a contingent or unliquidated claim where fixing or liquidation of that claim "would unduly delay the closing of the case." But while

> a creditor may have his claim estimated for purpose of allowance and the right, therefore, to share in the distribution of the debtor's assets, a surety or person secondarily liable with the debtor on the claim of such creditor has no right to share in the distribution of the debtor's assets until such time as the creditor's claim shall have been paid in full. In recognition of the difference in status of the surety and the debtor's creditor, section 502(e)(1)(B), apparently, but not really in derogation of section 502(c), disallows any claim made by the surety or person secondarily liable with the debtor of any claim for reimbursement or contribution to the extent that that claim is contingent as of the time of allowance or disallowance. A claim of a surety is contingent, in this context, until the surety pays the principal creditor and thereby fixes his own right to payment from the debtor.

3 *Collier on Bankruptcy* ¶ 502.05 at 502-87-502-88 (15th ed. 1989) (footnotes omitted).

In the context of this case, it is possible to view Juniper both as a direct creditor of Hemingway and as an entity jointly liable with the Debtor. To the extent Juniper undertook or undertakes remedial action to reduce or eliminate the threat of hazardous wastes it can recover those response costs from the person ultimately responsible. In this case that person allegedly is Hemingway. Section 502(c) then would appear to apply, if at all, to that type of claim for direct response costs. However, section 502(e)(1)(B) would appear to apply for claims for compensation or

reimbursement for response costs incurred by the EPA for which Juniper might ultimately be adjudged liable.

B. Applicable Provisions of CERCLA

Although Juniper's complaint makes no reference to the specific section of CERCLA under which it is proceeding, there are only two applicable sections. The first, section 107(a) of CERCLA, provides in relevant part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section — . . .
>
> > (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, . . . shall be liable for —
> >
> > (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan. . . .

42 U.S.C. § 9607(a). Courts are virtually unanimous in holding that a private right of action exists under CERCLA. *See e.g., Walls v. Waste Resource Corp.*, 761 F.2d 311 (6th Cir. 1985); *United States v. New Castle County*, 642 F. Supp. 1258, 1261 (D. Del. 1986); *Artesian Water Co. v. Government of New Castle County*, 605 F. Supp. 1348 (D. Del. 1985); *Pinole Point Properties, Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283 (N.D. Cal. 1984); *Jones v. Inmont Corp.*, 584 F. Supp. 1425 (S.D. Ohio 1984); *City of*

Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135 (E.D. Pa. 1982). According to the court in *New Castle County*, "[t]he right of action emanates from the plan language of the section and provides relief to any person incurring response costs for which another person is otherwise liable under the Act." 642 F. Supp. at 1262. Moreover, as the court in *New Castle County* recognized, prior to SARA, most courts were in agreement that a right of contribution existed under CERCLA, as well. *Id.* In that case, the court concluded that Congress did not expressly provide for a right of contribution and that such a right was not authorized by clear implication from section 107(a)(4)(B). However, the court did find that "Congress empowered the federal courts to establish a federal law of contribution under CERCLA." *Id.* at 1265. The court, in reaching this conclusion, relied on CERCLA's legislative history, recent legislative developments (i.e., consideration by Congress of SARA), and the presence of substantial federal interests, namely the promotion of expeditious settlement of Superfund suits and the protection of the Superfund's financial resources from depletion. *Id.* at 1268-69.

The second applicable section is section 113(f)(1) of CERCLA, which was added by SARA. It now makes plain that a right of contribution exists under CERCLA. It provides:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607 (a) of this title, during or following any civil action under section 9606 of this title or under section 9607 (a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving

> contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607 of this title.

42 U.S.C. § 9613(f)(1). The legislation, essentially was designed to ratify existing judicial decisions. 131 Cong. Rec. H. 11,083 (daily ed. Dec. 5, 1985). However, the Court notes that it may be problematic whether Juniper can assert a claim under this section because it only allows a person to seek contribution from another person who is liable or potentially liable, "during or following any civil action under section 9606 of this title or under section 9607(a) of this title. . . ." 42 U.S.C. § 9613(f). Juniper never has alleged that the administrative order of February 7, 1986 constitutes a civil action.

C. Case Law

In *In re The Charter Company,* 862 F.2d 1500 (11th Cir. 1989), the Court of Appeals for the Eleventh Circuit considered proofs of claim seeking contribution, reimbursement or indemnity from the debtor, The Charter Company ("Charter"). The claims against Charter arose from on-going lawsuits commenced by the United States, the State of Missouri, and approximately 500 other named plaintiffs to recover over $3 billion for injuries, losses and costs allegedly suffered or incurred due to the disposal of dioxin-bearing waste in Missouri. The claimants, who were alleged to have jointly owned, managed and controlled the manufacturing facility where the toxic waste was generated, alleged that Charter and another

bankrupt entity, Independent Petrochemical Corporation ("IPC"), were jointly and severally liable to them under CERCLA for any monetary award that might be assessed against them since Charter and IPC arranged for the transportation of the waste. Charter and IPC objected to the claims pursuant to section 502 (e)(l)(B) of the Bankruptcy Code, and the bankruptcy court disallowed the claims. The district court affirmed the bankruptcy courts ruling in *In re The Charter Co.*, 81 B.R. 644 (M.D. Fla. 1987). *See* 862 F.2d at 1501-02.

The Eleventh Circuit noted that the claimants, through the proofs of claim in question, sought indemnification or, alternatively, contribution. The court stated:

> All are claims for reimbursement or contribution pursuant to 42 U.S.C. § 9613(f)(1) and, as alleged by the appellants themselves, the claims are ones for which . . . [the claimants] . . . are liable with the debtor. Additionally, the claims were contingent at the time they were disallowed by the Bankruptcy Court. Any rights that . . . [the claimants] . . . may have to indemnity or contribution from Charter and IPC depend entirely on the success of the plaintiffs against the appellants in the still-pending Missouri litigation.

Id. at 1503 (footnote omitted). The court dismissed the claimants theoretical argument that they could assert private party claims pursuant to section 107(a)(4)(B) of CERCLA by undertaking remedial actions to reduce or eliminate the hazardous waste. These claims would not be for contribution, and Charter and IPC would not be jointly liable for them. The court stated:

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> Instead of alleging recompense due under CERCLA for response costs incurred *directly* by them, . . . [the claimants] . . . merely allege in their proofs of claim that they are entitled to compensation or reimbursement for response costs *incurred by the Missouri plaintiffs* for which . . . [the claimants] . . . may be ultimately adjudged liable. Thus, these admittedly contingent claims are . . . also ones for which . . . [the claimants] . . . are necessarily "liable with the debtor."

Id. (footnote omitted).

From the foregoing case, it is apparent that in order for the Trustee to succeed in his objection to Juniper's claim for future response costs, which costs only could arise from a final judgment or a settlement in a case commenced by the United States against Juniper, as opposed to the response costs which Juniper has incurred to date pursuant to the administrative order of February 7, 1986, the Trustee must establish the following: 1) the claim must be one for reimbursement or contribution; 2) the entity asserting the claim for reimbursement or contribution must be "liable with the debtor;" and 3) the claim must be contingent at the time of allowance or disallowance. *See In re Wedtech Corp.*, 85 B.R. 285, 289 (S.D.N.Y. 1988); *In re Provincetown-Boston Airlines, Inc.*, 72 B.R. 307, 309 (Bankr. M.D. Fla. 1987).

In *In re Wedtech Corp.*, 85 B.R. 285 (Bankr. S.D.N.Y. 1988) ("Wedtech I"), and *In re Wedtech Corp.*, 87 B.R. 279 (Bankr. S.D.N.Y. 1988) ("Wedtech II), bankruptcy courts elaborated on the requirements of section 502(e)(1)(B). In Wedtech I, the court considered the claimant's argument that the co-liability

requirement permits section 502(e)(1)(B) to apply only where the underlying plaintiff (in this case, it would be the EPA) has filed a claim in the bankruptcy case and that claim has been allowed. The court found that "the statutory language of 502(e)(1)(B) contains no such requirement." 85 B.R. at 289. The court indicated that, in contrast to section 502(e)(1)(A), which does contain the requirement that claims for contribution be disallowed to the extent that the creditors' claims against the estate are disallowed, 502(e)(1)(B) reflects the fact that "the purpose of disallowing contingent indemnity and contribution claims is precisely because they are so contingent." *Id.* at 290. The court also went on to indicate that the co-liability requirement cannot be interpreted to limit section 502(e)(1)(B) to instances where both the debtor and the claimant have been found liable in the underlying lawsuit. *Id.* The court stated:

> Indemnification, as opposed to the common law right of contribution, has no such requirement. More importantly, to interpret § 502(e)(1)(B) as requiring that a debtor be found liable in the underlying lawsuit would render it practically meaningless in light of § 362(a)'s automatic stay of actions to recover on pre-petition claims. Thus, the co-liability requirement is to be interpreted to require a finding that the causes of action in the underlying lawsuit assert claims upon which, if proven, the debtor could be liable but for the automatic stay.

Id. (citations omitted).

In Wedtech II, the court rejected the argument of a claimant, KMG, that section 502(e)(1)(B) does not apply to joint tortfeasors.

The court explained its decision as follows:

> KMG's admonition that the court read section 502(e)(1)(B) consistently with sections 501(b) and 509(a), each of which uses the phrase "an entity that is liable with the debtor" or a close variant, is not misguided. But KMG's conclusion that a joint tortfeasor is not such an entity who may pursuant to section 501(b) file a proof of claim if the underlying creditor does not do so is simply wrong. *See* 3 L. King, *Collier on Bankruptcy*, ¶ 501.02 at 501-11-501-12 and n. 7 (15th ed. 1988) (Fed. R. Bankr. P. 3005, in conjunction with section 501(b), makes it clear that anyone, including a joint tortfeasor, who is liable on a debt of the debtor is authorized to file in the name of the creditor). Moreover, section 509(a) does not by its terms exclude joint tortfeasors. If there were some theory by which the joint tortfeasor could claim subrogation, the statute would permit that subrogated claim.

87 B.R. at 284.

With these precepts in mind, the Court has no difficulty concluding that the Trustee's Motion for Summary Judgment is allowable as to Juniper's claim for future response costs. Juniper denominates its claim for future response costs as one for indemnification or contribution, thereby satisfying the first requirement of section 502(e)(1)(B).[4]

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4. In *In re Wedtech Corp.*, 85 B.R. 285, 289 (Bankr. S.D.N.Y. 1988), the court ruled that "the concept of reimbursement includes indemnity."

With respect to the co-liability requirement, the Trustee, for purposes of his motion, has assumed liability *arguendo*. Clearly, both Juniper, as the present owner, and the Trustee, as a person who at the time of disposal of any hazardous substance owned the property, could be liable for the cost of remediating the property and the entire Wells G&H Site pursuant to sections 9607(a)(1) and (a)(2) of CERCLA, and the EPA has so determined by naming both potentially responsible parties.

Finally, the contingency of Juniper's claim for future response costs is obvious. With respect to obligations stemming from the administrative order, Juniper states in its complaint that it is awaiting "further orders for a possible future clean up. . . ." With respect to costs of remediating the Wells G & H Site, any claim that Juniper would have would be contingent upon the United States commencing and prevailing in an enforcement action under CERCLA or Juniper's involvement in performing or financing cleanup work at the Site.

In its opposition to the Trustee's Motion for Summary Judgment, Juniper failed to address section 502(e)(1)(B) of the Bankruptcy Code, arguing instead that "there exist genuine issues of material fact as to Juniper's future liability at Wells G & H, and the future costs to be incurred." Although the Court can sympathize with Juniper's predicament, the material fact claimed to be in dispute is the very contingency the Trustee's motion addresses. Accordingly, the Court reiterates its finding that there are no material facts in dispute and hereby allows the Trustee's Motion for Summary Judgment.

By the Court,

s/ James N. Gabriel
James N. Gabriel
Chief Judge

Appendix D

Dated: September 13, 1989

c.c. William Macauley, Esq.
Louis N. Massery, Esq.
Thomas V. Urmy, Jr., Esq.

APPENDIX E — OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MASSACHUSETTS DATED MAY 8, 1987

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

Case Nos. 82-1340-JNG
82-1341-JNG

Adversary Proceeding
86-1081-JNG

HEMINGWAY TRANSPORT, INC.
BRISTOL TERMINALS, INC.
Debtors

JUNIPER DEVELOPMENT GROUP, A MASSACHUSETTS PARTNERSHIP AND GEORGE D. WHITTEN, AMY WHITTEN, AND CHARLES WHITTEN AS TRUSTEES OF THE 60 OLYMPIA NOMINEE TRUST,

Plaintiffs

v.

HERBERT C. KAHN, TRUSTEE FOR HEMINGWAY TRANSPORT, INC., AND BRISTOL TERMINALS, INC.,

Defendants

Appendix E

MEMORANDUM

INTRODUCTION

The matter before the Court is the Motion for Summary Judgment filed by the Chapter 7 Trustee of Hemingway Transport, Inc. and Bristol Terminals, Inc. (collectively, the "Debtor" or "Hemingway"). The motion, which raises an issue of first impression in this Court, arises out of an action brought by the above named plaintiffs (collectively, the "Plaintiff" or "Juniper") against the Trustee, seeking damages and equitable recision in connection with the purchase of the land and buildings (a trucking terminal and approximately 21.4 acres land) known as 60 Olympia Avenue, Woburn, Massachusetts from the Debtor while the Debtor was in Chapter 11.[1]

Juniper's complaint contains three counts that are predicated upon the following allegations:

> 1) that the Debtor, on or about May 18, 1983, sold the property to Juniper free and clear of all liens and encumberances;
>
> 2) that, at the time of the sale, the Debtor knew or had reason to know that an administrative order had been issued by the Massachusetts Department of Environmental Quality Engineering (the "DEQE"), requiring the Debtor to clean up approximately twelve

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1 The docket reveals that the Chapter 11 cases, which were filed on July 28, 1982, were converted to cases under Chapter 7 on November 28, 1983. The Trustee was appointed one day later.

barrels of hazardous wastes on an isolated portion of the Debtor's property;

3) that both the Bankruptcy Court and the United States District Court for the District of Massachusetts authorized the May 18th sale;

4) that the Debtor concealed the DEQE order from Juniper; and

5) that the United States Environmental Protection Agency (the "EPA") discovered the barrels in September of 1985 and subsequently issued an administrative order requiring Juniper to remove the barrels and to perform investigative work.[2]

In count I, Juniper alleges that the Trustee is a potentially responsible party under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C.A. §§ 9601-9657 (West 1983 & Supp. 1987) ("CERCLA"). Juniper seeks contribution from the Trustee for all or part of the past and future costs of cleanup in that count. In count II, Juniper alleges fraud and breach of warranties on the part of the Debtor in conjunction with the sale. It seeks judgment in indemnity for all present and future costs of cleanup in count II. As an alternative remedy, Juniper, in count III, alleges a fraudulent conveyance and

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2 Prior to the filing of the instant adversary proceeding, George Whitten d/b/a 60 Olympia Avenue Nominee Trust filed a "Motion for Stay of Bankruptcy Proceedings" with a copy of the EPA order attached. The order identified a number of harmful chemicals that were discovered in the drums and in the soil surrounding the drums during an EPA site inspection in September of 1985.

seeks recision of the sale and the return of the purchase price and other expenses incident to the sale.

In response to Juniper's allegations and claims, the Trustee asks the Court for summary judgment against Juniper. The Trustee asserts that there are no material facts in dispute and that:

> 1. the Court lacks subject matter jurisdiction to hear the CERCLA cause of action because the Plaintiff has not complied with the presuit requirements of that Act;
>
> 2. the Plaintiff has, at most, an unsecured claim against the Debtor's estates if the Debtor is a "potentially responsible party" under CERCLA and therefore the appropriate remedy is a request to file a late proof of claim;
>
> 3. the Plaintiff has failed to allege fraud with particularity as required under Fed. R. Civ. P. 9(b);
>
> 4. the Plaintiff's breach of warranty claim fails as a matter of law because no lien or encumbrance was ever placed on the property under Mass. Gen. Laws ch. 21E; and Plaintiff purchased the property without warranties and specifically subject to environmental and other applicable laws; and
>
> 5. the Plaintiff's fraudulent transfer claim based on Mass. Gen. Laws ch. 21C, § 7 fails because that provision only applies to facilities

licensed to treat, store, or dispose of hazardous waste.

Under Fed. R. Civ. P. 56(c), which is made applicable to this adversary proceeding by Bankruptcy Rule 7056, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The Supreme Court has recently ruled that Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, __ U.S. __, No. 85-198, slip op. at 5 (S. Ct. June 25, 1986).

With respect to the first of the Trustee's arguments as to the appropriateness of summary judgment, the Court ruled from the bench that the 60 day notice requirement contained in section 112 (a) of CERCLA, 42 U.S.C. § 9612(a), an ostensible presuit requirement with which Juniper did not comply, is inapplicable to a claim under section 107(a) of CERCLA, 42 U.S.C. § 9607(a), citing the recent First Circuit Court of Appeals decision in *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1077 (1st Cir. 1986). *See also State of New York v. General Electric Co.*, 592 F. Supp. 291, 300 (N.D. N.Y. 1984). As a consequence, the Trustee's jurisdictional argument need not be addressed in this memorandum.

I.

Without conceding that the Debtor is a responsible party under CERCLA, the Trustee, with respect to count I of Juniper's

complaint, maintains that even if Juniper has a valid claim under 42 U.S.C. § 9607(a)[3] it would be a general unsecured claim.

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3 Section 9607(a) provides in relevant part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for-
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian Tribe not inconsistent with the national contingency plan;

(Cont'd)

According to the Trustee, in order for Juniper to be able to seek response costs from the Debtor it must establish that the chemicals in the drums, which have been removed from the property, are hazardous substances and that the Debtor owned or operated the facility at the time the drums were deposited there. The Trustee notes that, pursuant to 42 U.S.C. § 9607(a)(2), Juniper neither alleged nor offered proof that the Debtor owned or operated the facility (defined at 42 U.S.C. § 9601 (9) as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise comes to be located. . .") at the time the drums were placed on the Woburn property. However, the Trustee does not deny that the Debtor owned the property at the time the barrels were deposited on the property.

The Court observes initially that the Trustee is correct in pointing out that the Plaintiff has failed to allege that the Debtor owned the Woburn site at the time the drums were placed on the property. The Court, therefore, will assume for purposes of this opinion that Juniper will amend its complaint to include this necessary averment. In view of Juniper's assiduous defense of the

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(Cont'd)

> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release;
>
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

11 U.S.C. § 9607(a)

summary judgment motion, the Court presumes that its failure to make this allegation was an oversight.

Citing *In re Wall Tube and Metal Products Co.*, 56 B.R. 918 (E.D. Tenn. 1986), the Trustee next asserts that even if Juniper could prove that the Debtor is a responsible party, the Court could find that because the drums were placed on the property prior to the filing of the petition on July 28, 1982, any response cost claim would be a general unsecured claim. The Trustee also cites *In re Wall Tube and Metal Products Co.* for the proposition that once property is no longer property of the estate, expenses incurred in connection with the removal of hazardous waste from it cannot be administrative costs of preserving the estate. 56 B.R. at 924.

Juniper, in its memorandum, criticizes the Trustee for suggesting, at least implicitly, that response costs cannot be recovered from a trustee due to lack of ownership. Relying on *In re T.P. Long Chemical, Inc.*, 45 B.R. 278 (N.D. Ohio 1985), Juniper maintains that once the hazardous waste became the property of the estate, the estate became potentially liable as a person under CERCLA. Juniper also maintains that the costs of removing the hazardous waste from the Woburn site are entitled to administrative expense priority as actual and necessary costs of preserving the estate. *See* 11 U.S.C. § 503(b) and 507(a). In support of its position, Juniper insists that the Trustee and the estate became liable for the toxic waste cleanup at least one year prior to the May 18, 1983 sale when the DEQE issued an administrative order requiring the cleanup of the hazardous waste on the site.

By way of background, section 9607(a)(2)(A), (B) of CERCLA expressly creates a private cause of action for damages. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 890 (9th Cir.

1986). It imposes a strict liability standard. *United States v. Price*, 577 F. Supp 1103 (D.N.J. 1983). In *Price* the court noted:

> [A]lthough the term 'strict' was deleted at the last minute, it still appears that Congress intended to impose a strict liability standard subject only to the affirmative defenses listed in § 107(b). This conclusion is reinforced by virtue of the fact that Congress left the 'due care' defense in the statute, a defense which would be rendered meaningless in the absence of strict liability. Moreover, the strict liability standard fits most closely with the legislative aims of CERCLA which include goals such as cost spreading and assurance that responsible parties bear the cost of the clean up. The fulfillment of these Congressional goals is more likely to be effectuated if the defendants who allegedly contributed to the environmental mess are now held to a very stringent standard of liability. Though strict liability may impose harsh results on certain defendants, it is the most equitable solution in view of the alternative - forcing those who bear no responsibility for causing the damage, the taxpayers, to shoulder the full cost of the clean up.

577 F.2d at 1113-14 (citations and footnote omitted). *See also State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985); *United States v. Dickerson*, 640 F.Supp. 448, 451 (D. Md. 1986); *In re T.P. Long Chemical, Inc.*, 45 B.R. 278 (N.D. Ohio 1985).

Appendix E

To be liable under CERCLA, an owner or operator must be a person, i.e., "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or an interstate body." 42 U.S.C. § 9601(21). Courts generally have held that the liability provisions of CERCLA should be broadly construed. *In re T. P. Long Chemical, Inc.*, 45 B.R. at 283. Accordingly, a debtor and a debtor's estate are persons as defined in CERCLA. *Id.* at 284.

With respect to any suggestion that the Trustee is not a proper party due to lack of ownership, the court in *Long Chemical* discussed at length the question of whether a claim under 42 U.S.C. § 9607(a) is a claim against the estate or a claim against the trustee. In holding that the EPA had a claim against the estate and not against the trustee, the court stated:

> The trustee, pursuant to section 323 of the Bankruptcy Code, is the representative of the estate. As such he can sue or be sued. Although the trustee does not hold title to the estate property, the Bankruptcy Code does provide him with certain powers associated with ownership. Chief among these powers is the power to use, sell, or lease property of the estate as provided in section 363 of the Bankruptcy Code.
>
> Another power which the trustee has under the Bankruptcy Code is the power to operate the debtor's business. This power applies to both a Chapter 11 trustee and a Chapter 7 trustee.

Id. at 283. This Court notes that the Chapter 7 Trustee in the instant case was not involved in the sale of the Olympia Avenue property. However, the Court agrees with the reasoning of Judge White in *Long Chemical* with respect to the propriety of Juniper bringing suit against the Trustee with respect to its claim against the estate.

Turning to the status of Juniper's section 9607(a) claim as an administrative or prepetition unsecured claim, the Court is confronted with a seemingly intractable problem. The problem results from two competing governmental concerns, namely concern for debtors and concern for the environment. This Court is not the first to note that the policy of giving debtors a "fresh start" and preserving and equitably distributing their assets may conflict with the policy of protecting and removing hazardous wastes from the environment. *See generally Penn Terra, Ltd. v. Department of Environmental Resources,* 733 F.2d 267, 269 (3d Cir. 1984); *In re Distrigas Corp.,* 66 B.R. 382, 384 (Bankr. D. Mass. 1986). Two recent United States Supreme Court cases teach that where possible the two objectives should be reconciled. *See Midlantic National Bank v New Jersey Department of Environmental Protection,* __ U.S. __, 106 S. Ct. 755 (1986); *Ohio v. Kovacs,* 469 U.S. 274 (1984). Nevertheless, the question of priority status for environmental cleanup costs incurred postpetition has not been directly answered or addressed by the Supreme Court. *In re Pierce Coal and Construction, Inc.,* 65 B.R. 521, 530 (Bankr. N.D.W.Va. 1986).

Courts have addressed a variety of questions raised by the interaction of the Bankruptcy Code and environmental statutes such as CERCLA, including questions regarding the dischargeability of cleanup obligations, the trustee's power to abandon property containing hazardous wastes and the application of the automatic stay to enforcement actions by state and federal

environmental agencies. The two cases relied upon by the Trustee and Juniper and other cases that the Court will consider with respect to environmental cleanup costs as administrative expenses provide the Court with guidance and warrant an in-depth examination.

In *In re T. P. Long Chemical, Inc.*, 45 B.R. 278 (Bankr. N.D. Ohio 1985), the court determined that response costs incurred by the EPA in cleaning up hazardous wastes were entitled to priority as administrative expenses. The EPA's cleanup expenses were incurred postpetition and involved the cleanup and removal of buried drums and surrounding soil. The court found that the drums were unquestionably property of the bankruptcy estate and that they fell within CERCLA's broad definition of a facility. Accordingly, the Court determined that the estate was liable under section 107(a) of CERCLA. The court rejected the trustee's argument that since the drums were not sold with the rest of the debtor's property at an estate auction, they must be deemed abandoned. The court stated:

> [O]nce the drums became property of the estate, the estate became potentially liable under CERCLA. This liability is based on the estate's relationship to the drums, but is independent of the drums themselves. Subsequent abandonment or transfer of the drums does not transfer the estate's liability.

45 B.R. at 285. The Court relied on section 107(e)(1) of CERCLA to support its position. That section provides:

> (1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator

> of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.
>
> (2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

42 U.S.C. § 9607(e). The court reiterated that "even if an estate could otherwise escape liability by the trustee's abandonment of property such abandonment would not be effective under CERCLA." 45 B.R. 285. The court concluded that "the cost incurred by the EPA in discharging this liability is an actual and necessary cost of preserving the estate entitled to administrative expense priority." *Id.* at 286.

Although Juniper relies on *Long Chemical*, it is interesting to note that the EPA in the *Long Chemical* case and Juniper in the instant case appear to be in a more analogous position with respect to a tank containing sulfur monochloride than with respect to the drums buried on the Long site. The EPA did not claim it was entitled to an administrative expense priority with respect to the cleanup of the tank because the tank had been sold by the trustee at the auction sale and was no longer property of the estate. Similarly,

the property at issue here was sold by Hemingway and was not part of the estate when response costs were incurred. As part of its findings of fact, the court in *Long Chemical* noted:

> The E.P.A. has admitted that the costs attributed to the cleanup of the sulfur monochloride are not allowable as an administrative expense because at the time of the release, the tank was not property of the estate and because the cleanup of the soil immediately adjacent to the tank involved real property which never was property of the estate.

45 B.R. at 281 (footnote omitted). The EPA did seek reimbursement for these expenses as a general unsecured creditor, however.

The case relied upon by Juniper, *In re Wall Tube and Metal Products Co.*, 56 B.R. 918 (Bankr. E.D. Tenn. 1986), involved a claim by the State of Tennessee on behalf of the Tennessee Department of Health and Environment for postpetition expenses in connection with investigation and identification of tanks containing hazardous wastes. The trustee had given notice of an intent to convey certain items of property according to an agreement in which the buyer, who was the Debtor's former lessor, had agreed to purchase certain fixtures as well as to assume responsibility for the removal and cleanup of the tanks containing hazardous chemicals.

Although the state argued that the trustee's conveyance of the property to the lessor pursuant to the agreement may not operate as an impermissible abandonment of property of the estate for the

purpose of avoiding the estate's liability for environmental cleanup costs under CERCLA, the court declared that the cases relied upon by the state in support of its argument, *City of New York v. Quanta Resouces Corp.*, 739 F.2d 912 (3rd Cir. 1984), *aff'd sub nom. Midlantic National Bank v. New Jersey Department of Environmental Protection*, __ U.S. __, 106 S.Ct. 755 (1986) and *In re T. P. Long Chemical, Inc.*, 45 B.R. 278 (Bankr. N.D. Ohio 1985), were distinguishable. The court stated:

> In *Long Chemical* the property in question was property of the estate at the time the response expenses were incurred. By definition, in order to be entitled to administrative priority, expenses must be 'actual, necessary costs and expenses of preserving the estate.' 11 U.S.C. § 503(b)(1)(A) (West 1979). This Court has already concluded that public policy does not prohibit the conveyance of the property out of the estate pursuant to the July 1984 agreement. Clearly, once the property is no longer property of the estate, any expenses thereafter incurred in connection with the property cannot qualify as administrative costs of preserving the estate. 'Fiduciaries are not at liberty to 'preserve' the property in which their cestui have no interest.'

In re Wall Tube and Metal Products Co., 56 B.R. at 923. Significantly, the court in *Wall Tube* did not disagree with the court in *Long Chemical* with respect to the transfer of CERCLA liability, emphasizing that "[t]o any extent that the estate had already incurred liability or the potential for liability under the applicable statutory provisions, that liability could in no way be transferred or

eliminated by the simple act of conveying the property out of the estate." 56 B.R. at 923. However, the *Wall Tube* court concluded that the conveyance at issue in the case before it "was essentially a sale to a presumably solvent entity who, by assuming ownership of the property, obviously also incurred the potential for liability for any CERCLA response costs thereafter incurred in connection with the property." *Id.* (footnote omitted).

The court's conclusion that public policy was not violated by a conveyance to a solvent entity was predicated on the Supreme Court's observation in *Ohio v. Kovacs*, 469 U.S. 274 (1984) that:

> If the site at issue were Kovacs' property, the trustee would shortly determine whether it was of value to the estate. If the property was worth more than the costs of bringing it into compliance with state law, the trustee would undoubtedly sell it for its net value, and the buyer would clean up the property, in which event whatever obligation Kovacs might have had to clean up the property would have been satisfied. If the property were worth less than the cost of cleanup, the trustee would likely abandon it to its prior owner, who would have to comply with the state environmental law to the extent of his or its ability.

469 U.S. at 284-85 n. 12. Since the buyer in *Wall Tube* was aware of the presence of toxic waste on the property and agreed to assume responsibility for cleanup costs, it is obvious that the parties had made some type of assessment of the value of the property to the estate.

From the foregoing analysis of the two cases relied upon by

the Trustee and Juniper, it is clear that both are factually distinguishable from the instant case in key respects. Specifically, both *Long Chemical* and *Wall Tube* involved applications for allowances of costs incurred by governmental agencies as opposed to an adversary proceeding pursuant to 11 U.S.C. § 9607(a) of CERCLA. Additionally, in the *Long Chemical* case, the release of sulfur monochloride occurred *after* the property was transferred out of the bankruptcy estate. In the instant case, the facts indicate that the drums were releasing hazardous chemicals or at least threatened to release them into the environment prior to the transfer of the property to Juniper. Moreover, the DEQE had ordered the removal of the drums before the transfer of the property, indicating that Hemingway had at a minimum already incurred the potential for liability.

With respect to the *Wall Tube* case, it is clear that the buyer was well aware that there was a hazardous waste problem when it purchased assets of the estate and agreed to assume responsibility for the removal and cleanup of the waste. In the instant case, none of the interested parties, including the Trustee, Juniper and the two courts that approved the sale, were apprised of the presence of hazardous wastes on the property, despite the DEQE action.

In view of the unique factual situation confronting the Court and the absence of a clear precedent in the cases cited by the parties, the Court is compelled to examine other cases addressing the question of whether environmental clean up costs are administrative expenses. The Court of Appeals for the Third Circuit, in *Southern Railway Company v. Johnson Bronze Company,* 758 F.2d 137 (3d Cir. 1985), considered a contractual indemnification claim of Southern Railway Company. Southern Railway had given the debtor Johnson Bronze Company a prepetition license to dispose of sewage in a drainage ditch on its

rightof-way. After the South Carolina Department of Health and Environmental Control ("SCDHEC") had commenced an administrative enforcement action against it, Southern Railway asserted that its claim should be treated differently than the claims of general unsecured creditors. The court, in declining to afford priority to Southern's claim, stated:

> [T]he only basis which it [Soutnern] suggests for such preferential treatment is that because SCDHEC has sought to force it to clean up the drainage ditch it should be subrogated to the rights, against Johnson, of SCDHEC. Assuming without deciding that there is some legal basis for the recognition of such a subrogation right, it can rise no higher than that of SCDHEC. In *Ohio v. Kovacs* ... the Supreme Court held that Ohio's injunction directing the cleanup of a hazardous waste site was no more than a general unsecured claim. In this case, South Carolina's administrative order had not even been reduced to judgment. Thus, the claim to which Southern seeks to be subrogated, a general unsecured claim, in no way improves its priority.

758 F.2d at 141. Although the court suggested that the Supreme Court spoke definitively on the priority question in *Ohio v. Kovacs,* the court appears to overlook the fact that the Supreme Court emphasized that it did not decide "what the legal consequence would have been had Kovacs taken bankruptcy before a receiver had been appointed and a trustee had been designated with the usual duties of a bankruptcy trustee." *Kovacs,* 469 U.S. at 284. Accordingly, this Court concludes that the Supreme Court in

Kovacs did not in fact definitively decide the priority question with respect to postpetition cleanup orders and, therefore, the Third's Circuit's opinion in *Southern Railway Company v. Johnson Bronze Company* is not dispositive of the count I issue.

The United States District Court for the District of Maine, in *In re Charles Stevens,* 68 B.R. 774 (D. Maine 1987), a Chapter 7 case, recently decided the issue of whether the cost of a postpetition cleanup of a prepetition environmental hazard by the State of Maine Department of Environmental Protection ("DEP") constitutes a first priority administrative expense or an unsecured claim. Its conclusion differed from that of the Third Circuit. The court found that the Supreme Court's decision in *Midlantic National Bank v. New Jersey Department of Environmental Protection,* __ U.S. __, 106 S. Ct. 755 (1986) altered the criteria for determining administrative expenses. Accordingly, the court concluded that since the trustee, who was obligated to comply with valid Maine law regulating the disposal of hazardous waste, failed to arrange for its removal and disposal the estate was liable for the costs the DEP incurred in removing the waste as an administrative expense. 68 B.R. at 783.

Assuming, as did the Third Circuit in *Southern Railway Company v. Johnson Bronze Company,* 758 F.2d at 141, that Juniper may have some right of subrogation to the EPA or the DEQE, then Juniper's response costs easily could be classified as an administrative expense pursuant to *In re Stevens,* 68 B.R. 774 (D. Maine 1987), if the costs were incurred with respect to property of the estate.

In a recent bankruptcy court opinion, *In re Pierce Coal and Construction, Inc.,* 65 B.R. 521 (Bankr. N.D.W.Va. 1986), the court noted:

Appendix E

> Congress specifically categorized prepetition expenses into priorities in 11 U.S.C. § 507. The 1984 amendments expanded the list of priorities, but no category was created for environmental damages and this Court is not empowered with the authority to change the priorities enacted by Congress.

65 B.R. at 530. However, the court, after careful review of the developing body of case law and 11 U.S.C. §§ 507 and 503(b)(1)(A), concluded that an insurance company's claim as a subrogee of the State of West Virginia for the cost of reclaiming areas disturbed by the debtor in possession, who was engaged in surface coal mining, was entitled to administrative expense priority. *Id.*

In *In re Dant & Russell, Inc.*, 61 B.R. 668 (Bankr. D. Or. 1985), *aff'd*, 67 B.R. 360 (D. Or. 1986), the court, following *Southern Railway Co. v. Johnson Bronze Co.*, 758 F.2d 137 (3d Cir. 1985), held that a lessor was not entitled to administrative priority for the cost of removing toxic waste deposited prior to the filing of the Chapter 11 by the debtor, who occupied the lessor's property under both an unauthorized postpetition lease and an earlier lease in existence at the time of filing. Unlike the situation in the instant case, the court was able to determine that the debtor's liability for damages to the lessor arose prior to the filing of the Chapter 11. However, the district court opinion clearly reveals that the toxic waste problem was identified by the state environmental authorities postpetition and the lessor incurred response costs to mitigate hazards under an agreement with the EPA postpetition as well.

In the District of Massachusetts, the court per Judge Lavien

addressed the issue of whether the State of New Jersey, as the holder of "a contingent administrative or, possibly secured claim" should be classified as an impaired class for purposes of confirmation of a plan of reorganization. *In re Distrigas Corp.*, 66 B.R. 382 (Bankr. D. Mass. 1986). Although New Jersey had entered into an administrative consent order with respect to a complete resolution of the toxic waste problem, New Jersey had neither commenced formal action to compel the debtor to clean up toxic waste nor expended any money to resolve the problem. At the time of filing, the State had merely sent a letter to the debtor in an effort to enforce its clean up powers. *Id.* at 385. The court ruled that New Jersey could not be impaired under a plan and was entitled to administrative claim treatment instead. Like the situation in *In re Dant & Russell, Inc.*, 61 B.R 668 (Bankr. D. Or. 1985), toxic waste problems in *Distrigas* stemmed from the activities of either the debtor or its predecessors in interest prior to the Chapter 11. Unlike the Oregon court, the court in *Distrigas* relied on the Supreme Court's decision in *Midlantic National Bank,* stating: "[t]o the extent it would seek reimbursement, it would under the Supreme Court's *Midland [sic] National Bank v. New Jersey, supra,* decision obtain a first priority administrative claim." 66 B.R. at 386.

The preceding review of recent cases involving the classification of clean up costs reveals that the peculiar facts of each case more often than not determine the outcome. Moreover, it would appear that some cases may be rightly decided for the wrong reasons.

In the instant case Juniper's cause of action under CERCLA arose when the property containing the drums was transferred to Juniper or, alternatively, when Juniper expended money n response to the EPA's administrative order. Accordingly, any liability for

damages under CERCLA arose postpetition, although the toxic wastes presumably were dumped on the Woburn property prepetition. *Cf. United States v. Price,* 577 F. Supp. 1103, 1110 (D.N.J. 1983) ("It appears with respect to §107, that the government must first begin the cost of cleanup and incur some expenses before it can initiate an action."); *State ex rel. Brown v. Georgeoff,* 562 F. Supp. 1300, 1315 (N.D.Oho 1983).[4]

Accordingly, Juniper's claim under CERCLA is distinguishable from the prepetition claim analyzed in *Southern Railway Co. v. Johnson Bronze Co.,* 758 F.2d 137 (3d Cir. 1985), and the claim analyzed in *In re Dant & Russell, Inc.,* 61 B.R. 668 (Bankr. D. Or. 1985), which was not predicated on CERCLA. Moreover, unlike all of the other cases just discussed, except *Dant & Russell,* and *Southern Railway* the instant case does not involve a claim by a governmental unit. Therefore, while the cases discussed are helpful in resolving the dispute between Juniper and the Trustee they are not determinative.

Essentially, Juniper, in count I, has alleged that under CERCLA the trustee is strictly liable to it for its past and future response costs. Accordingly, the determination of whether Juniper's claim for damages is an administrative expense is governed, not so much by the Supreme Court decisions in *Midlantic National Bank* and *Kovacs* but by the Supreme Court's

---

4 The Court notes that the question of when a cause of action accrues under CERCLA has led two judges of the Southern District of New York to withdraw the reference from the bankruptcy court of that district. *In re Combustion Equipment Associates, Inc.,* 67 B.R. 709 (S.D.N.Y. 1986); *United States v. Johns-Manville Corp.,* 63 B.R. 600 (S.D.N.Y. 1986), see 28 U.S.C. §159(d). In the instant case, the Debtor may well have incurred the potential for liability prepetition. However, with respect to its liability to Juniper pursuant to § 107(a)(2)(B) of CERCLA, the Debtor incurred that liability postpetition.

decision in *Reading Co. v. Brown,* 391 U.S. 471 (1968). In that case, which involved an interpretation of § 64(a) of the Bankruptcy Act,[5] which is substantially similar to 11 U.S.C. §§ 503(b) and 507(a), the Supreme Court held that damages resulting from the negligence of a receiver acting within the scope of his authority gave rise to actual and necessary costs of operating the debtor's business under a Chapter XI arrangement and, therefore, were entitled to priority status as costs of administration. The Supreme Court noted the arguments of the trustee, including 1) that first priority status for negligence claims would not encourage third parties to deal with insolvent businesses; 2) such status would reduce the amount of funds available for unsecured creditors; and 3) such status would discourage general creditors from accepting arrangements. Although the Supreme Court did not reject the relevant statutory objectives cited by the trustee— rehabilitation of insolvent businesses and preservation of assets for distribution among general creditors should the arrangement fail—it emphasized a single point: "the trustee has overlooked one important, and here decisive statutory objective: fairness to all persons having claims against an insolvent." 471 U.S. at 477. Noting that the victims of the receiver's negligence did not merely suffer injury at the hands of an insolvent business but had an insolvent business thrust upon them by operation of law, the Supreme Court concluded that:

---

5 Section 64(a) provides in part as follows:

> The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankruptcy estates, and the order of payment, shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to the filing of the petition. . . .

> it would be inconsistent both with the principle of *respondeat superior* and with the rule of fairness in bankruptcy to seek these objectives at the cost of excluding tort creditors of the arrangement from its assets, or totally subordinating the claims of those on whom the arrangement is imposed to the claims of those for whose benefit it is instituted.

471 U.S. at 479.

In the case of *In re Charlesbank Laundry, Inc.*, 755 F.2d 200 (1st Cir. 1985), the Court of Appeals for the First Circuit relied on *Reading Co. v. Brown* and held that a civil compensatory fine for the debtor's violation of an injunction qualified for first priority treatment as an actual and necessary administrative expense of preserving the estate, even though the injunction arose from proceedings involving allegations of nuisance rather than negligence. After the debtor filed its Chapter 11 case, the plaintiff sought that portion of the fine representing post-filing legal expenses. Although the bankruptcy judge and the district court judge denied the claim as an administrative expense, the Court of Appeals for the First Circuit stated: "If fairness dictates that a tort claim based on negligence should be ahead of pre-organization claims, then, *a fortiori,* an intentional act which violates the law and damages others should be so treated." *In re Charlesbank Laundry, Inc.*, 755 F.2d at 203.

In the Court's view, the rationale of the *Reading Co. v. Brown* and *In re Charlesbank Laundry, Inc.* cases compel a ruling that the response costs incurred by Juniper are entitled to treatment as administrative expenses. Indeed, the factual circumstances of the instant case are more analogous to those two cases than the

bankruptcy cases cited by the parties and the other cases just discussed. Clearly, if damages leading to a negligence claim against a receiver qualify as administrative expenses then so do damages giving rise to a strict liability claim against a Chapter 11 debtor-in-possession under CERCLA. Accordingly, the Court holds Juniper is entitled to its response costs as Chapter 11 administrative expenses.

Not only is the Court moved by the concept of fairness emphasized by the Supreme Court and the First Circuit Court of Appeals, it is moved by its awareness that both the court in *Long Chemical,* and the court in *Wall Tube* frowned on the notion of a debtor attempting to transfer its liability or potential for liability under state or federal environmental laws. Since in this case, it is undisputed that the Debtor was given some type of notice by the DEQE of the barrels containing toxic chemicals on its property, it is likely that the Debtor incurred at least the potential for liability under Massachusetts or federal environmental laws. Thus, the Court's decision not only comports with the rationale of the Supreme Court's decision in *Brown* but also with the concerns expressed by the bankruptcy courts in the two cases cited by the parties.

II

As the Trustee correctly recognizes, the basis of Juniper's cause of action set forth in count II of its complaint is far from clear. The Trustee debunks two possible theories upon which count II may be predicated: 1) that the Olympia Avenue property was encumbered by the Massachusetts "Superlien," *see* Mass. Gen. Laws ch. 21E, §13; and 2) that the debtor-in-possession breached warranties with respect to the May 18, 1983 conveyance.

Appendix E

Juniper maintains that the Olympia Avenue property is encumbered by a statutory lien pursuant to Mass. Gen. Laws ch. 21E, § 13 because it was conveyed after the Debtor was notified by the DEQE of the presence of twelve barrels containing hazardous waste on the property. Section 13 provides in relevant part:

> Any liability to the commonwealth under this chapter shall constitute a debt to the commonwealth. Any such debt, together with interest thereon at the rate of twelve per cent per annum from the date such debt becomes due, shall constitute a lien on all property owned by persons liable under this chapter *when a statement of claim naming such persons is recorded or filed.* If the site described in such statement comprises real property, the statement shall be recorded in each registry of deeds in the commonwealth; and shall also be registered in each registry district in which any person named in such statement of claim holds record title to registered land as shown on the current index of registered land owners in such district. The land court certificate number of each such owner shall be noted on the statement when presented for recording and each assistant recorder, upon receipt of such statement, shall note such statement on the owner's certificate of title. . .

Mass. Gen. Laws Ann. ch. 21E, § 13 (West 1981 & Supp. 1987) (emphasis supplied). Juniper suggests that the Trustee misconstrues the statute and its effect on the litigation by arguing

that no lien or liability notice was ever recorded to encumber the property. However, Juniper cites neither the legislative history nor case law for the proposition that a lien is created absent the requisite filings. While the Court is sympathetic to Juniper's position, the Court considers Juniper to be the party misconstruing section 13 of chapter 21E. The language of section 13 is unambiguous. It requires the recording or filing of a statement of claim for a debt to the Commonwealth to constitute a lien on the property. In the absence of any authority for a contrary interpretation of the plain language of the statute, this Court will not endeavor to create a lien in Juniper's favor.

With respect to the breach of warranty theory addressed at length by the Trustee in its briefs in support of its motion for summary judgment, the Court notes that Juniper has failed to respond to the Trustee's compelling arguments either in its brief in opposition to the Trustee's motion for summary judgment or by way of a reply brief to the Trustee's supplemental brief. Accordingly, the Court will not consider this aspect of count II in depth. Nevertheless, the Court is struck by the specific, separately typed language in the standard form purchase and sale agreement executed between the Debtor and Juniper to the effect that:

> Buyer further warrants and represents to Seller that Buyer has made all such inspections of the premises as Buyer wishes to make. It's a condition to Buyer's obligation to purchase that the Premises may be used as a freight transfer station and warehouse. Prior to the delivery of the deed, Buyer will satisfy himself that such is the case and whether the Premises comply with the Building, Zoning and Wetlands Protection laws.

In view of this disclaimer, the Court would be hard pressed to find in favor of Juniper even if Juniper were to pursue count II on a breach of warranty theory apart from Mass. Gen. Laws ch. 21E, §13. Accordingly, the Court grants summary judgment in favor on the Trustee on count II. However, this ruling does not implicate Juniper's CERCLA claim. *See Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1986).[6]

III

Like count II of Juniper's complaint, count III lacks specificity.[7] The Court has characterized the count as one for equitable recision. Juniper suggests that it is entitled to a recision

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6 The court in *Mardan Corp.* noted that:

> [T]he warranty disclaimer is effective to preclude only causes of action which are based on breach of warranty theory. Mardan's lawsuit is based not upon waranty theory but rather upon the statutory cause of action created by section 107(a) of CERCLA. Therefore, [the warranty disclaimer of the purchase agreement] does not defeat plaintiff's recovery.

600 F. Supp. at 1055.

7 Count III provides in relevant part:

> Said Conveyance was fraudulent and voidable and entitles the Plaintiff to a recission of the sale, return of the purchase price, reimbursement for all transportation costs, and reimbursement for the present fair market value of the property had no hazardous waste existed.

of the March, 1983 conveyance because of fraud and because of a violation of Mass. Gen. Laws ch. 21C, § 7.

To the extent that count III (or for that matter count II) rests on fraud, the Court finds that Juniper has failed to plead fraud with the specificity required by Fed R. Civ. P. 9(b) which is made applicable to this adversary proceeding by Bankruptcy Rule 7009. In particular, Juniper has no where alleged that it relied on materially false representations made by the Debtor. Moreover, in its memorandum, it has failed to rebut the Trustee's argument that the general rule in Massachusetts with respect to mere nondisclosure should be applied. That rule provides that mere nondisclosure is not actionable absent affirmative steps by the Debtor to conceal defects or to prevent the plaintiff from acquiring knowledge of the defects. *See Swinton v. Whitinsville Savings Bank*, 311 Mass. 677 (1942). Although Juniper suggests that count III of its complaint is sufficient because its Motion for Stay of Bankruptcy, a pleading filed in the main case and not the instant adversary, gives notice of the fraud claim and further that the allegations in its complaint give notice of the act which is the basis of the claim, the Court notes that the element of reliance is absent from all its pleadings and is a particularly serious defect in view of the warranty disclaimer and the affidavits submitted by the Trustee that indicate hazardous waste issues were never raised by Juniper.

In its brief, Juniper also suggests that recision is an appropriate remedy because the property was fraudulently conveyed in violation of Mass. Gen. Laws ch. 21C, § 7. That section provides in relevant part:

> *Section 7.* Licenses for collection, transportation, treatment, etc., of hazardous waste; underground drinking water source

Appendix E

* * *

The department may issue a license subject to such terms, restrictions, conditions and requirements as it determines to be necessary to comply with the provisions of this chapter. No facilities shall be constructed, maintained or operated except pursuant to the terms, restrictions, conditions and requirements established by the department in a license duly issued hereunder and pursuant to the terms of an assignment of a site for said facilities if said assignment is required pursuant to the provisions of section one hundred and fifty A of chapter one hundred and eleven. No storage, treatment, use or disposal for which a license is required pursuant to this chapter, and no construction, maintenance, or operation of a facility for which such license is required, shall proceed until notice that such license has been recorded in the registry of deeds, or if the land affected thereby be registered land, in the registry section of the land court for the district wherein the land lies. *No land on or in which hazardous waste has been disposed, and no interest in such land, shall be conveyed or leased, and no such land shall be devoted to any use other than as a facility for such 'disposal,' until notice of such disposal is recorded in the registry of deeds, or if the land affected thereby be registered land, in the registry section of the land court for the district wherein the land lies.*

Mass. Gen. Laws ch. 21C, § 7 (West 1981 & Supp. 1987) (emphasis supplied). Juniper relies exclusively on the underlined portion of section 7 in conjunction with Mass. Gen. Laws ch. 21E, § 13 for its contention that the Debtor fraudulently conveyed the Olympia Avenue property. The Trustee, however, urges the Court to examine both the broader context of section 7, a section that concerns the issuance of licenses to commercial operations engaged in collecting and disposing of hazardous waste, and the definition of a facility, Mass. Gen. Laws. ch. 21E, § 2. Section 2 defines a facility as "a site or works for the storage, treatment, dewatering, refining, incinerating, reclamation, stabilization, solidification, disposal or other processes where hazardous wastes can be stored, treated or disposed of . . . ." *Id.* It precludes the creation of a facility by spills or unauthorized abandonment. The Trustee maintains that nothing in chapter 21C or its legislative history suggests that the chapter was intended to impose a statutory duty on all sellers of real estate to conduct investigations for the purpose of discovering hazardous wastes.

The Trustee adds that no case law exists permitting the sale of real estate to be voided pursuant to chapter 21C. In the complete absence of authority for Juniper's position, the Court agrees with the position advanced by the Trustee. Furthermore, because the Court has determined that Juniper has an adequate remedy at law under CERCLA, Juniper is not prejudiced by the entry of summary judgment in favor of the Trustee with respect to its claim for equitable recision. *Commonwealth of Massachusetts v. Pace,* 616 F. Supp. 815, 822 (D. Mass. 1985).

IV

In view of the foregoing, the Court hereby orders:

Appendix E

1) that Juniper amend count I to include the statutory prerequisite of 42 U.S.C. § 9607 (a) (2) (B) within 10 days of the date of this order if it wishes to pursue its cause of action and;

2) that a further hearing be scheduled for the purpose of establishing the exact amount of Juniper's response costs and estimating its future costs pursuant to 11 U.S.C. § 502(c).

3) that summary judgment enter in favor of the Trustee and against Juniper with respect to counts II and III of Juniper's complaint.

By the Court,

s/ James N. Gabriel
James N. Gabriel
Chief Judge

Dated at Boston, in said District, this 8th day of May, 1987.

c.c. Judy K. Mencher, Esquire
Andrew S. Hogeland, Esquire
Louis N. Massery, Esquire
Herbert C. Kahn, Esquire

Appendix E

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

Case Nos. 82-1340-JNG
82-1341-JNG

Adversary Proceeding
No. 86-1081-JNG

HEMINGWAY TRANSPORT, INC.
BRISTOL TERMINALS, INC.
Debtors

JUNIPER DEVELOPMENT GROUP, A MASSACHUSETTS PARTNERSHIP AND GEORGE D. WHITTEN, AMY WHITTEN, AND CHARLES WHITTEN AS TRUSTEES OF THE 60 OLYMPIA NOMINEE TRUST,

Plaintiffs

v.

HERBERT C. KAHN, TRUSTEE FOR HEMINGWAY TRANSPORT, INC., AND BRISTOL TERMINALS, INC.,

Defendants

ORDER

Appendix E

In accordance with the memorandum dated May 8, 1987, it is hereby ordered:

1) that Juniper amend count I to include the statutory prerequisite of 42 U.S.C. § 9607 (a)(2)(B) within 10 days of the date of this order if it wishes to pursue its cause of action and;

2) that a further hearing be scheduled for the purpose of establishing the exact amount of Juniper's response costs and estimating its future costs pursuant to 11 U.S.C. § 502(c).

3) that summary judgment enter in favor of the Trustee and against Juniper with respect to counts II and III of Juniper's complaint.

By the Court,

s/ James N. Gabriel
James N. Gabriel
Chief Judge

Dated at Boston, in said District, this 8th day of May, 1987.

APPENDIX F — STATUTORY PROVISIONS INVOLVED

1. 11 U.S.C. § 503(b)(1)(A): Allowance of Administrative Expenses

* * *

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including —
>
> > (1)(A) the actual, necessary costs and expenses of preserving the estate. . . .

2. 11 U.S.C. § 507(a)(1): Priorities

(a) The following expenses and claims have priority in the following order:

> (1) First, administrative expenses allowed under section 503(b) of this title. . . .

3. 11 U.S.C. § 502(e)(1)(B): Allowance of Claims or Interests

* * *

> (e)(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on . . . the claim of a creditor, to the extent that —

* * *

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution. . . .

Supreme Court, U.S.
FILED
SEP 10 1993
OFFICE OF THE CLERK

(2)

No. 93-187

In The

Supreme Court of the United States

October Term, 1993

IN RE HEMINGWAY TRANSPORT, INC., BRISTOL TERMINALS, INC.,

Debtors,

HERBERT C. KAHN, Trustee for HEMINGWAY TRANSPORT, INC. and BRISTOL TERMINALS, INC.,

Petitioner,

vs.

JUNIPER DEVELOPMENT GROUP, a Massachusetts Partnership; and GEORGE D. WHITTEN, AMY WHITTEN and CHARLES WHITTEN, as Trustees of 60 OLYMPIA NOMINEE TRUST,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No. 93-187

In The

Supreme Court of the United States

October Term, 1993

IN RE HEMINGWAY TRANSPORT, INC.,
BRISTOL TERMINALS, INC.,

Debtors,

HERBERT C. KAHN, Trustee for HEMINGWAY TRANSPORT, INC. and BRISTOL TERMINALS, INC.,

Petitioner,

vs.

JUNIPER DEVELOPMENT GROUP, a Massachusetts Partnership; and GEORGE D. WHITTEN, AMY WHITTEN and CHARLES WHITTEN, as Trustees of 60 OLYMPIA NOMINEE TRUST,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Introduction

This opposition to the Petition for Certiorari is filed by the Respondents on the grounds that while this case involves the interesting issues of the proper interplay

between the Bankruptcy Code, 11 U.S.C. §101 et seq. and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 et seq. ("CERCLA"), it relates to such a unique set of circumstances that it will not assist in other cases where a conflict exists between bankruptcy and environmental law. Furthermore, the case does not represent a conflict in the Circuits in that the decisions cited by Petitioners are either distinguishable or are in accord with the holding of the United States Court of Appeals for the First Circuit.

In but one instance does Respondent contest Petitioner's assertions in his introduction. But it is in that one assertion that this case turns. Contrary to Respondents' assertion that Juniper is "jointly and severally liable" for all costs of removal and remediation under CERCLA (Petitioner's Brief p. 3)[1], Respondent maintains that it is precisely that issue which has led the First Circuit Court of Appeals to remand the case to the Bankruptcy Court for further proceedings. The question of whether Juniper is an innocent landowner (App. 34a for a recitation of CERCLA "innocent landowner" requirements)[2] and therefore not "jointly and severally" liable for a CERCLA claim under 42 U.S.C. §9607(b) is the linchpin of the Court's remand.

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[1] Petitioner's Brief shall hereinafter be cited as "PB".

[2] References to App. with page numbers are to Petitioner's Appendix attached to its petition as distinguished from the Joint Appendix, hereinafter "JA", filed with the First Circuit.

B. Substantive Facts

While Petitioner correctly outlines many of the facts as they relate to the transaction which led to this appeal, he fails to reference a number of critical matters upon which the lower court relied in reaching its opinion. These include facts which lead the First Circuit to consider carefully the issue of the "innocent landowner" and its bearing upon Respondents' claims for administrative priority on its Superfund claims.

As the court noted, the subject drums were first discovered on the property at issue almost three (3) years prior to Juniper Development Group's purchase of the land (App. 3a-3b). On August 15, 1980, William Cashins, an employee of the Massachusetts Department of Environmental Quality Engineering (DEQE) (JA 264-266) found the drums and immediately put Hemingway Transport Company, the debtor herein and the owner of the land, on notice, both by letter and in person, of the discovery of the drums (JA 283-284). Hemingway Transport acknowledged their presence and advised the DEQE in November, 1980, that it would resolve the problem by removing the drums (JA 284-286) assuring the State, through Cashins, that Hemingway would obtain estimates from licensed contractors to remove them (JA 350). Despite repeated inspections by Cashins, however, the drums were never removed (JA 87-89 and 181), and in July, 1982, Hemingway and its affiliate Bristol, simultaneously filed Chapter 11 involuntary bankruptcy petitions. While at least the State had notice of the bankruptcy (JA 286), neither they nor EPA acted to file a proof of claim in the debtors bankruptcy. Indeed, neither even apparently re-visited the area, even though it was

allegedly within a Superfund site, for another two (2) years, until 1985 when the drums were re-discovered (JA 178). By that time, the property had been placed on the market for sale pursuant to the Chapter 11 Bankruptcy of Hemingway and Bristol and was purchased by the Respondents in May, 1983 (JA 220).

One of the Respondents, Charles Whitten, and other Juniper representatives undertook physical inspections of the 6½ acre property (JA 223-230) when the property was placed on the market in 1983. The property, completely bifurcated by the Aberjona River (JA 225-228), had usable parcels on one side for warehousing, and unusable swamp and wetlands across the river. One could only get directly from one side of the property to the other by using a boat across the river (JA 291). According to Whitten, the subject drums were not discovered during his Spring inspection because they were virtually inaccessible in the southern most panhandle of the property which is for many months of the year covered by water (JA 225-228).

Moreover, when inquiry was made by Whitten of the debtor's representative, David Butcher, prior to Juniper's purchase of the property, the presence of hazardous substances was expressly denied by Butcher (JA 229-237). This despite the fact that Butcher had been advised directly by environmental representatives that the barrels were on the site and had to be removed (JA 277 & 286).[3]

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[3] N.B. There is an error in the pagination of the joint appendix. JA 277 & 286 represent consecutive pages 87 & 88 in the trial transcript below.

The sale to Juniper through its general partner, George Whitten, was approved by the Bankruptcy Court on April 27, 1983 (Gabriel, J.). The Order authorized the sale to Respondents for a cash price of $1,632,000 and payment of a portion of the proceeds of such sale to the mortgage holder. The Order authorizing sale was subsequently approved by U.S. District Court Judge Rya W. Zobel on May 3, 1983. Said sale, "free and clear of all liens and encumbrances", took place on May 18, 1983 (JA 194).

While the EPA and Massachusetts DEQE were still working in the area as part of their Superfund review of the nearby Wells G & H, neither notified Juniper of the existence of the barrels until December, 1985 (JA 239). No notice was sent to the court or to any other party to the transaction that barrels had been found on the site and no proof of claim was filed by EPA (App. 18a & JA 172-174). Once the EPA showed Juniper the location of the drums and the EPA performed tests on the contents of the drums and the surrounding soil (JA 197), it thereafter served Juniper with a "Notification of Potential Liability" (JA 239), issuing an administrative order to Juniper as the current owner of the property to remove the drums and surrounding soil (JA 120 & 241). In fully complying with that order, Juniper engaged technical consultants for the removal work at a cost of $30,208.02 (JA 195).

Despite the compliance with this order and the complete cooperation of Juniper, the EPA refused to grant Juniper "innocent landowner" status under CERCLA and instead two (2) years later, on April 20, 1988, placed Juniper on notice that it was deemed a potentially responsible party under CERCLA and that the subject

property, 60 Olympia Avenue, was now considered part of the Wells G & H Superfund Site (JA 120). On February 3, 1989, the EPA notified the Trustee of Hemingway and Bristol's potential liability under CERCLA as a former owner or operator of the site and yet still did not file a proof of claim (JA 126). Instead, the EPA demanded payment from Juniper of over $2.1 million plus interest in past costs incurred pursuant to Section 107(a)(4)(B) of CERCLA. EPA further refused to become a party to this action (App. 18a) notwithstanding Juniper's best efforts to induce EPA to file its claim (App. 24a).

On September 14, 1989, the EPA issued its CERCLA Record of Decision with regard to the Wells G & H Site including the Respondents' property, estimating the cost to clean-up the Respondents' property alone as $6.2 million (JA 255-256).

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. The First Circuit Decision In *Hemingway* Is Not In Conflict With The Reported Decisions Of Other Courts Of Appeals.

The Petitioner suggests that this Court ought to consider this Petition on the grounds that there is a conflict between *In re Charter Company*, 862 F.2d 1500 (11th Cir. 1989), *In re Dant & Russell, Inc.*, 951 F.2d 246 (9th Cir. 1991), and this case. It is Respondents' position that *Charter* is distinguishable and that the First Circuit followed *Dant & Russell*.

In *Charter*, each of the claimants were named defendants in an existing action brought by various third-party plaintiffs, each of whom had already incurred environmental clean-up costs and then subsequently sought contribution or indemnity from the *Charter* claimants. The *Charter* claimants in turn, brought claims solely for contribution or indemnity against the bankrupt estate. *In re Charter*, 862 F.2d at 1502. Furthermore, the claimants' action was brought expressly under CERCLA §113(f) 42 U.S.C. §9613(f)(1) and not under 42 U.S.C. §9607, so that the claim was, by definition, one "for which they were liable with the debtor." *Id.* at 1502-1503. Thus, the precise issue before the court below, the applicability of §502(e)(1)(B) to Juniper's rights to a direct CERCLA response cost claim under §107, was not specifically addressed by the *Charter* court.

> We need not consider the hypothetical claims which Syntex and NEPACCO [claimants] might assert, however, since their proofs of claim in this case are not of that type. Instead of alleging recompense due under CERCLA for response costs incurred *directly* by them, Syntex and NEPACCO merely allege in their proofs of claim that they are entitled to compensation or reimbursement for response costs *incurred by the Missouri plaintiffs* for which Syntex and NEPACCO may be ultimately judged liable.

Charter, 862 F.2d at 1503 (*emphasis* in original).

The existence of an underlying plaintiff to which debtor and claimant are both potentially liable, was the crucial distinguishing feature between the *Charter* court and the issues facing the First Circuit.

As for *In re Dant & Russell Inc.*, 951 F.2d 246 (9th Cir. 1991), Petitioner now argues that a case upon which Respondent relied below is now in conflict with the First Circuit's opinion. Juniper relied upon *Dant & Russell* because it held that §502(e)(1)(B) *does not* exclude the creditor's direct, albeit contingent claims against the debtor to recover sums it had expended and would expend to remediate hazardous wastes at its property.

Dant & Russell concerned a CERCLA claim brought by a lessor of property ("BN") against the lessee ("D&R") for toxic contamination. As in this case, BN had originally incurred costs as a result of an EPA order and then sought recovery for past and future response costs. *Id.* at 247. BN requested and received the $7 million judgment for future responses costs, and the debtor appealed on the grounds that §502(e)(1)(B) mandated disallowance of the claim.

The Ninth Circuit commenced its analysis by noting "[w]hile the EPA reserved the right to take additional action against BN, it has not to date required BN to take actions other than those demanded by the Order." *Id.* at 247. (The EPA's position vis-a-vis Juniper in this case is identical). The court then analyzcd the complementary relationship between §502(c) and §502(e)(1)(B). "Section 502(c) permits the estimation of contingent or unliquidated damages so that the delay in the administration of the estate may be avoided. Accordingly, §502(e)(1)(B) was drafted to prevent competition between a creditor and his guarantor for the limited proceeds of the estate." *Id.* at 248 (citations omitted).

The First Circuit in this case followed closely the *Dant* court's rejection of the claim that since the future response costs claim against the debtor "depends on the uncertain action of EPA", the potential creditor ought not to recover:

> It is also well settled that §9607(a)(1-4)(B) permits a private party to recover from a responsible party response costs it incurs itself in conducting clean-up pursuant to CERCLA – even absent intervention by the state. *Rickland Oil Terminals, Inc. v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986).
>
> The CERCLA private right of action encourages voluntary private action to remedy environmental hazards. In this way, it furthers CERCLA's goal of responding to hazardous situations quickly. EPA arm twisting is not a prerequisite for filing a §9607(a)(4)(B) claim. *Id.* at 248.

The Ninth Circuit, just as the First Circuit has done in this case (App. 37a), remanded the case for estimation of future response costs, suggesting that a trust fund would be an appropriate equitable device to ensure proper site clean-up. *Id.* at 250.

While the Petitioner properly defines administrative expenses and cites to numerous cases supporting the proposition that the administrative expenses must be actual and not contingent, he fails to note that the court remanded the matter to the bankruptcy court for further hearings on the issue of whether Juniper is thereby not "strictly, jointly and severally liable" to the EPA and thereby barred by §502(e)(1) limitations. (App. 29a-32a). The First Circuit is therefore not in conflict with any other

circuit decision since it specifically requires a finding of fact that Juniper was an innocent landowner and thereby entitled to the administrative priority based on an estimate of the actual cost to clean-up the site. Furthermore, no other case has considered the effect of the innocent landowner defense where a sale of property resulted in a potential transfer of all the estate's environmental liability. Thus, while the remedy ordered by the Court may be unique, it is in response to a unique set of circumstances.

II. The First Circuit's Decision Is Not In Conflict With *Reading Co. v. Brown*

The First Circuit properly relied on *Reading Co. v. Brown*, 391 U.S. 471 (1968) despite Petitioner's claims that the only "post petition" event carried out by the debtors' business was the sale of the property which Juniper voluntarily purchased. What the First Circuit and the Bankruptcy Court were concerned about, however, was not simply the purchase and sale agreement which referenced environmental laws and lack of warranties, but the fact that the debtor-in-possession purposely hid information about the twelve subject barrels from the purchaser and set up a chain of events which, as the First Circuit noted, may "occasion a pointless financial loss to Juniper and result in a windfall to the Chapter 7 estate, notwithstanding Juniper's best efforts to induce EPA to file its claim." (App. 24a). The fairness language of *Reading* was of particular concern to the First Circuit. Obviously, when one purchases a parcel of land for $1.6 million, he does not expect to soon after have an environmental liability of

nearly $6 million. Juniper had purchased one of the largest assets of the debtor, its purchase price representing a major portion of the estate. To now suggest that the Bankruptcy Rules and *Reading* have no room to permit Juniper "to collect ahead of the Debtors' remaining creditors," when the Debtor in a post Chapter 11 act neglected to advise the purchaser of the existence of drums on the site, is simply extraordinary. Had it not been for the substantial purchase price paid by Respondents, it is a truism that the Trustee would have a smaller corpus to distribute among creditors. The Bankruptcy Court found, and the Circuit Court confirmed, that Juniper, just as the creditors in *Reading*, found itself "in a dilemma not of [its] own making." *Id.* at 483.

Additionally, *Reading* is not limited to post petition *torts* but has been applied to any post petition activity so long as it results in the incurrence of liability. *See e.g., In re Charlesbank Laundry, Inc.*, 755 F.2d 200 (1st Cir. 1985); *In re Mammoth Mart, Inc.*, 536 F.2d 950, 955 (1st Cir. 1976); *Yorke v. NLRB*, 709 F.2d 1138, 1143 (7th Cir. 1983); *Carter-Wallace, Inc. v. Davis-Edwards Pharmaceutical Corp.*, 443 F.2d 867, 874 (2nd Cir. 1971).

In *Charlesbank*, the First Circuit relied on *Reading* in holding that a civil compensatory fine for the debtor-in-possession's post-petition violation of a state court injunction was an administrative expense. The First Circuit, reversing the District Court which had affirmed the denial of administrative expense priority by the Bankruptcy Court, held:

> The debtor in this case *deliberately* continued a violation of law month after month presumably because it was more lucrative for the business to

> operate outside the zoning ordinance than within it. If fairness dictates that a tort claim based on negligence should be paid ahead of pre-organization claims, then, *a fortiori*, an intentional act which violates the law and damages others should be so treated.

In re Charlesbank, 755 F.2d at 202.

The First Circuit correctly applied the rationales and holding in *Reading* in ruling that the response costs incurred by Juniper are entitled to administrative expense priority. "Clearly, if damages leading to a negligence claim against a receiver qualify as administrative expenses then so do damages giving rise to a strict liability claim against a Chapter 11 debtor-in-possession under CERCLA". *In re Hemingway Transport, Inc.*, 73 B.R. 494, 505 (Bankr. D. Mass. 1987).

In determining whether administrative expense priority should be applied the inquiry focuses on the post-petition actions or inactions of the debtor-in-possession/ trustee.

> It is only when the debtor-in-possession's actions themselves – that is, considered apart from any obligation of the debtor – give rise to a legal liability that the claimant is entitled to the priority of a cost and expense of administration. When the debtor-in-possession commits a tort, *See, Reading Co. v. Brown*, 391 U.S. 417 (1968), or accepts services without paying for them, the debtor-in-possession itself causes legally cognizable injury, and the resulting claims for compensation are entitled to first priority.

Mammoth Mart, 536 F.2d at 955.

It is not only Hemingway's sale of the property to Juniper that gives rise to Juniper's actionable claims; Hemingway is statutorily strictly liable by virtue of Hemingway's ownership of the property at the time of disposal of hazardous substances. Since Hemingway's ownership and resulting CERCLA liability extended post-petition, as a debtor-in-possession, Juniper's claims against Hemingway were properly found to have administrative expense priority.

III. The First Circuit's Decision Does Not Conflict With The Midlantic National Bank Line Of Cases

Petitioner argues that the First Circuit's opinion conflicts with the *Midlantic National Bank* line of cases. *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S.Ct. 755 (1986). Curiously he does not, however, argue that the First Circuit's decision conflicts with *Midlantic* itself. This is not surprising since *Midlantic* has been relied on by Respondent since the commencement of this action. *Midlantic* not only holds that "Congress did not intend for the Bankruptcy Code to pre-empt all state laws that otherwise curtail the exercise of a trustee's powers", 106 S.Ct. 755 at 762, but also held that: "Congress has repeatedly expressed its legislative determination that the trustee is not to have carte blanche to ignore non-bankruptcy law" and that "efforts of the trustee to marshall and distribute the assets of the estate must yield to governmental interest in public health and safety." *Id.* at 760.

Indeed, the Supreme Court specifically rejected the trustees' argument in *Midlantic* that he ought not to be

subject to environmental statutes "when he is liquidating [the estate]." *Id.* at 762. Certainly liquidation includes not only the abandonment of the property but also the sale of the property to an unsuspecting purchaser. There is nothing in *Midlantic* which requires that the property at issue be "property of the estate" at the time the costs were incurred. Rather, there is a warning to trustees and debtors-in-possession that they, just like solvent property owners, will retain liability when environmental damage occurs during their custody of the premises.

Finally, Petitioner suggests that there is no "imminent and identifiable harm" to the public health and safety as required by *Midlantic. Id.* at 762-63 n.9. While the Respondents themselves have attempted to suggest this to the EPA, they still face demands from the EPA to perform a Superfund clean-up valued at nearly $6.2 million with a claim by EPA that the property is part of one of the largest Superfund sites in America. Petitioner is hardly in a position to suggest at this time that the drums present only a "minor threat" to the environment.

IV. The Petition Ought To Be Denied Because This Case Presents No Opportunity For The Court To Answer Questions Of Broad Applicability To The Issues Confronting The Proper Balance Between The Competing Objectives of CERCLA And The Bankruptcy Code

This case offers a unique set of circumstances which are not likely to be duplicated in other cases involving bankruptcy and CERCLA, including:

1. Purchase of property from a Chapter 11 debtor-in-possession, who knew about contaminated barrels on the property, but failed to notify the purchaser or the court in seeking approval of the sale.

2. Contamination on the property for which the government had notice for more than two (2) years prior to the sale, where the government failed to ensure that the incident barrels were removed in a timely manner.

3. Government agencies who failed to file notices of claim against the bankrupt estate despite actual knowledge of the contamination and the bankruptcy.

4. Failure of the government agencies even as of this date to file a notice of claim against the bankrupt estate despite invitations to do so.

5. The decision by the EPA nearly eight (8) years after the alleged contamination was discovered to include the property for the first time as part of a larger nearby Superfund Site (JA 120).

6. Failure of the government to date to file an enforcement action against the Respondents, despite naming them a potentially responsible party in 1988, thereby requiring the lower court to establish mechanisms for estimating the future loss to the Respondents.

This Court has expressed its concerns that in exercising its discretion on a petition for a writ of certiorari, it must consider those cases which "involve principles the settlement of which is of importance to the public as

distinguished from that of the parties . . . " *Lane & Bolle Corp. v. Western Well Works, Inc.*, 261 U.S. 387 392-393 (1923). There seems little doubt that Respondents' individual plight was of great concern to the First Circuit. As the court pointed out: "Juniper finds itself stranded at the increasingly crowded 'intersection' between the discordant legislative approaches embodied in CERCLA and in the Bankruptcy Code." (App. 7a). Indeed, the Circuit Court expressed its concern for Respondents by noting that Juniper may be subject to "pointless financial loss" (App. 23a-24a) particularly in light of the fact that the lower court "may have considered Juniper's responsibility of any contamination extremely minimal, especially in comparison to Hemingway-Bristol." (App. 36a-37a). The First Circuit reflected upon these unique facts, which are unlikely to be repeated and fashioned a potential remedy not likely to be available to other creditors. Indeed, one could hardly imagine that the inharmonic convergence of property owner silence, government inaction and inaccessible wetlands would occur again.

Thus, while the applicability of §502(e)(1)(B) of the Bankruptcy Code to contingent claims under CERCLA may be unique to this case, it is not likely to have applicability to other CERCLA claims because of the unusual facts faced by the Circuit in its review.

CONCLUSION

For the reasons stated and on the authorities cited, the Respondents request that the trustee's petition for a writ of certiorari be denied.

Respectfully submitted,

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